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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-161

MEDLIN MARINE, INCORPORATED,
Petitioner,

vs.

MRS. ALANA G. HEIMAN, in Her Own Right; SANDRA JEAN HEIMAN, by MRS. ALANA G. HEIMAN, Her Mother and Next Friend; and H. MAURICE MITCHELL and JOSEPH W. GELZINE, Co-Administrators in Succession With Will Annexed of the Estate of Max Heiman, Deceased, and MARINE DEVELOPMENT CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

The Petitioner Medlin Marine, Inc. respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on May 14, 1976.

OPINIONS BELOW

The per curiam order of the Court of Appeals, not yet reported, appears in the Appendix, pages A-1-A-2. The original

Opinion of the Court of Appeals, not reported, appears in the Appendix, pages A-3-A-22. The Supplemental Memorandum Opinion of the District Court appears in the Appendix, pages A-23-A-25. The Memorandum Opinion of the District Court, not reported, appears in the Appendix, pages A-26-A-48. The District Court's Findings of Fact appear in the Appendix, pages A-49-A-60.

JURISDICTION

The Judgment of the Court of Appeals was entered on May 14, 1976. A timely Petition for Rehearing was denied on May 7, 1976 and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether, under Federal Maritime Law, the Court of Appeals for the Eighth Circuit erred in refusing to grant indemnity to petitioner, Medlin Marine, Inc., an innocent retailer, from Marine Development Corporation, a negligent manufacturer.

2. Whether the Trial Court erred in projecting a specific rate of inflation over Max Heiman's life expectancy in measuring damages for loss of future earnings.

STATEMENT OF THE CASE

This is an admiralty case originally brought in Federal District Court for the Eastern District of Arkansas under the provisions of Federal Rules of Civil Procedure 9 (h). Max Heiman died aboard a pleasure yacht from carbon monoxide asphyxia-

tion on the night of September 1, 1973. His wife, Alana, and daughter, Sandra, were injured. An action was commenced by the estate of Max Heiman and by his wife and daughter against Boatel, the manufacturer of the boat; Kohler, the manufacturer of a gasoline powered generator on the boat; Marine Development, Inc., the manufacturer of an air conditioning unit on the boat; and the petitioner, Medlin Marine, Inc., the retailer of the boat.

The case was tried to the Court and at the conclusion of the evidence the Trial Judge, in open court, made specific findings of fact. The Court found that Boatel was negligent and liable in strict liability. (Appendix pg. A-49) (Boatel was a bankrupt and did not appear or defend at trial). Marine Development was found negligent and strictly liable for failure to warn. (Appendix pg. A-57) The Court found that Medlin Marine was not negligent but that it was liable in strict liability as seller of the boat. (Appendix pg. A-49) Kohler was found not liable. (Appendix pg. A-29)

As between Boatel and Marine Development the Court apportioned the fault as 80% on Boatel and 20% on Marine Development. (Appendix pg. A-47) Medlin was given judgment for indemnity against Boatel. In a Supplemental Opinion, the Court denied Medlin's claim for indemnity against Marine Development holding instead that Marine Development and Medlin Marine should share the loss equally. (Appendix pg. A-25)

In assessing damages for loss of future earnings, the Trial Court allowed the testimony of an economist as to an inflationary factor to be used in computing damages for future wage loss and used the economist's testimony in arriving at the damages to award for future wage loss. (Appendix pg. A-46)

Petitioner appealed the lower court's decision to the Eighth Circuit Court of Appeals on the question of its right to indemnity from Marine Development and on the issue of damages.

The Eighth Circuit originally found that Medlin was entitled to indemnity from Marine Development. In addition, the Circuit Court found that the Lower Court erred in allowing the economist to testify concerning future inflationary trends. The Court of Appeals affirmed the Lower Court verdict however, finding that the introduction of the economist's testimony did not constitute reversible error.

After rehearing en banc an equally divided Eighth Circuit withdrew its earlier Opinion and reinstated the Lower Court Judgment.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is in Conflict With the Decisions of Other Courts of Appeals as to the Right of Indemnity, Under Federal Maritime Law, of a Non-Negligent Party Required to Respond in Damages, From the Negligent Party Whose Conduct Caused the Injury.

The Federal Courts sitting in admiralty have long recognized the right of an innocent or only passively negligent party to recover from the person whose wrong actually caused the injury. In the case of *Standard Oil Company v. Robins Dry Dock and Repair Co.*, 32 F.2d 182 (2nd Cir. 1929), the Second Circuit affirmed a ship owner's right to recover over for damages paid to a seaman in its employ against a dry dock company whose negligence caused the employee's injury. In so holding, Circuit Judge Augustus N. Hand stated:

> "The matter which remained open to litigation in the case at bar was the question whether the defective gangway installed by the drydock company was the *primary* cause of the injuries to Anstee. The installation of a defective gangplank for the use of employees involved active negligence on the part of drydock company, whereas the neglect of the Standard Oil Company [ship owner] to inspect the gangway and warn its employees against danger was a secondary fault of omission. In such circumstances the plaintiff was entitled to indemnity."

In *Simpson Timber Company v. Park*, 390 F.2d 353 (9th Cir. 1968) the Ninth Circuit allowed indemnity to a ship owner against the manufacturer of doors which were packed in such a way that a seaman fell through the doors. In allowing indemnity the Ninth Circuit stated:

> "The ship owner's liability rested solely upon the ship owner's breach, without fault, of its non-delegable duty to

> provide the longshoreman a safe place to work, and the unseaworthy condition was created solely by the manufacturer's wrongdoing. When the ship owner pays the judgment and thus discharges the manufacturer's obligation, the manufacturer cannot equitably be permitted to retain the benefit thus conferred. In these circumstances, settled principles of quasi-contract require the manufacturer to hold the ship owner harmless."

The Ninth Circuit continued by saying:

> "Moreover, by imposing ultimate liability upon the negligent manufacturer, the loss is placed upon the actor whose default caused the injury. The one best able to eliminate the risk is given the greatest incentive to do so."

In *Tri-State Oil Tool Industries, Inc. v. Delta Marine Drilling Company*, 410 F.2d 178 (5th Cir. 1969), the Fifth Circuit recognized the general rule as stated in the *Simpson Timber Case*:

> "We are in agreement with the principles contained in the *Simpson Timber Case*. It would be wrong to assess damages against a non-negligent or passively negligent ship owner for loss or injuries suffered solely as a result of active negligence of another party, regardless of the absence of a contractual relationship between the parties.
>
> "This accident occurred in navigable waters; therefore, the Federal Maritime Law is the applicable law. (Citations omitted). As we have already indicated, Maritime Law provides for tort indemnity where there is no negligence or only passive negligence attributed to the indemnitee." 410 F.2d at 186.

In the present case, the Trial Court found that the death of Max Heiman and the injuries to his wife and daughter were caused by the negligence of Boatel, the manufacturer of the

boat, and the negligence of Marine Development Company, the manufacturer of the air conditioner. The Judge apportioned the negligence between these actively negligent parties as 80% on Boatel and 20% on Marine Development. The Trial Judge found as fact that Medlin Marine was not negligent and that its liability was based solely on its position in the chain of distribution of the boat. After making those findings, the Trial Court ruled that Medlin Marine, Inc. was entitled to indemnity from Boatel (a bankrupt who did not participate in the trial) but that Medlin was not entitled to indemnity from Marine Development Corporation. The Trial Court treated Medlin and Marine Development as joint tort feasors and divided their liability equally.

Based on the principles set forth in the *Simpson Timber Case* and the *Delta Marine Case* this holding was clearly erroneous. On appeal to the Eighth Circuit that Court in its original Opinion had no difficulty in deciding that Medlin Marine was entitled to indemnity from Marine Development finding, "no authority which would alter the traditional tests of indemnity under the circumstances." However, after rehearing the case en banc, an equally divided Court ignored the precedents of the other circuits and its own research and withdrew its earlier opinion by per curiam order without opinion.

The effect of the action of the Eighth Circuit was to reinstate the decision of the District Court and hold that under Federal Maritime Law, a non-negligent party is not entitled to indemnity from a party whose negligence actually caused the wrongs complained of. As pointed out above, that is not the law and has never been the law in the United States. Although the present case does not involve liability imposed on a non-negligent ship owner based on its non-delegable duty to provide a safe place to work, the principles involved are exactly the same. Medlin Marine's liability was based entirely on its position in the chain of distribution, without fault on its part. In both the above instances, the non-negligent parties are held strictly liable

for damages merely because of their positions. The questions presented in both instances is the same. Under Federal Maritime Law, is a non-negligent party entitled to indemnity from a party whose negligent conduct caused the injury complained of? The answer to that question is, of course, yes.

The principles involved in this case have been before this Court before, however, the issue has never been presented so clearly. In the two principal cases touching the issues involved here, *Ryan Stevedoring Co. v. Pan Atlantic Steamship Corp.*, 350 US 124 (1956) and *Federal Marine Terminals, Inc. v. Burnside Shipping Co., Ltd.*, 394 US 404 (1969), the Court found it unnecessary to decide the question. In addition in those cases the issue was complicated by contracts and statutes. In the instant case, the Trial Court made specific findings of fact, finding Marine Development Corporation negligent and finding Medlin Marine, Inc. not negligent. Those findings give the Court the opportunity to face the issue squarely and hold that indemnity is the proper remedy in admiralty for a party required to respond in damages for the negligence of another, in the absence of an express or implied contract.

This Court has not decided the issue of whether under Federal Maritime Law a non-negligent or only passively negligent tort feasor is entitled to indemnity from a negligent tort feasor whose wrongs caused the injuries. *Federal Marine Terminals v. Burnside Shipping Co.*, supra, see also, *Ryan's Stevedoring Company v. Pan Atlantic S. S. Corp.*, supra. The question specifically left open in the above-cited cases is an issue of extreme importance to litigants in the Admiralty Courts.

2. **The Circuit Courts Are Not in Agreement on the Question of Whether Federal Admiralty Courts May Consider Future Inflationary Trends in Awarding Damages for Future Earnings.**

When one considers classical categories of speculation and uncertainty, it is not unusual for economic forecast to head the list.

Our courts have traditionally required more than speculation in the adjudication of rights of parties. The specific question presented in this Petition is whether a federal judge may project inflationary trends to enhance a verdict for future wage loss awarded. For the most part the circuits are in agreement that expert testimony on inflationary trends and projected income increases is not admissible and may not be considered in assessing damages for future wage loss. There are several reasons for their holdings, however, the primary reason, and the one that is based on empirical evidence is that no one really knows what the future will bring, especially over the short term. The nation's economists have not been successful in predicting what will happen next quarter, however, some federal courts are allowing their testimony to show what will happen twenty or thirty years in the future. Those economists may be able to predict what the long term trend is, however, as Lord Maynor Keynes, the father of modern economic theory so aptly put it, "In the long term we are all dead."

In the present case, the Trial Court allowed the testimony of an economist who, based on a historical economic trend line, projected an inflationary rate of 5½% per year over the decedent's working life of 21.6 years. Although the Trial Judge did not accept the economist's exact figures, he stated in his Memorandum Opinion:

> "While not agreeing with certain of his findings and conclusions concerning future trends, the Court was impressed with his overall analysis thereof and has used that analysis, along with other evidence in the case, in reaching its own conclusion as to the appropriate adjustment in this case for inflationary trends."

The Judge's own conclusion was that the inflation rate for the next 21.6 years would be 4% per year. What other evidence in the case was used in making that determination was not specified; nor can it be discerned from a reading of the record.

Other circuits faced with the type testimony presented in this case have, for the most part, refused to allow that testimony.

In *Johnson v. Penrod Drilling*, 510 F.2d 234 (5th Cir. 1975), the Trial Judge, sitting as a fact finder, after allowing the testimony of an economist concerning future inflationary trends, found that the plaintiff's future income would increase at a rate of 4.8% per year and awarded damages based on that finding. In reversing the lower court the Fifth Circuit stated at page 241:

> "Although we today reverse the judgments entered below on the jury trial question discussed supra, we expressly disapprove the District Court's attempt to take into account, in computing the plaintiff's future lost earnings, inflationary trends in this nation's economy for the next several decades. As the Sixth Circuit concluded in its *Sleeman Decision*, we hold that the influence on future damages of possible inflation or deflation is too speculative a matter for judicial determination. Should either or both of these cases be retried before a jury, the triers of fact should not be instructed to take into account future inflationary or deflationary trends in computing future lost earnings, nor should the jury be advised to consider such alternative descriptions of inflationary and deflationary trends as the purchasing power of the dollar or the consumer price index."

In *Sleeman v. Chesapeake & Ohio Railway Co.*, 414 F.2d 305 (6th Cir. 1969), a case relied on by the Fifth Circuit in the *Penrod Drilling Company Case* above the Sixth Circuit reversed a damage award in a FELA case because the Trial Court had not reduced the damages awarded for future earnings to the present value because "inflationary trends would offset any present worth reduction." In reversing the case the Sixth Circuit stated at page 307:

> "As to the inflationary trend offset, this record provides no evidentiary basis for the decision of the District Judge.

Gowdy v. United States, supra, in which the District Judge arrived at the same conclusion after hearing some economic testimony is not authority for the offset in this case, since it has been reversed on other grounds. *Gowdy v. United States*, 412 F.2d 525 (6th Cir. 1969). Nor do we encourage the trial courts of our circuit to explore such speculative influences on future damages as inflation and deflation.

"Of course, the nation's economic history since the 1930s would appear to make the use of present wages as the standard for loss of future earnings somewhat unfair to plaintiffs. But as to the future, the inflation v. deflation debate rages inconclusively at the highest policy levels of our government, in national electoral campaigns, in learned economic journals and is exemplified in the daily gyrations of the stock markets. The debate seems unlikely to be resolved satisfactorily in one personal injury trial. And if testimonal resolution of this factor bearing on the future is attempted, the door is open to similarly speculative and debatable offsets tending in other directions." (emphasis ours)

In *Frankel v. Heim*, 466 F.2d 1226 (3rd Cir. 1972) the Third Circuit agreed with the District Court's analysis and conclusion below regarding the consideration of inflation in awarding damages for future medical expenses. On the trial below the District Court in *Frankel v. U.S.*, 321 F. Supp 1331 (E.D. Penn. 1970) stated at 1346:

"The projected inflationary trend is speculation. Plaintiff has used the decade of 1960, one of the more inflationary times in the history of our country, as the basis for projection of over 50 years. It is common knowledge that our government is and has been attempting to control inflation, even to the point of considering wage and price controls. Economist differ on their predictions. Moreover plaintiff will have money that can be invested and if inflation

> continues, the returned money will be greater, and this would have an offsetting effect. The increase in cost for institutional care will not be considered."

In *Williams v. United States*, 435 F.2d 804 (1st Circuit 1970), the 1st Circuit in an action pursued under the Federal Tort Claims Act stated at pg. 807:

> "Nor, finally, can we accept plaintiff's argument that the anticipated future earnings are to be increased by some multiple taken out of the air in the name of future inflation. While plaintiff submitted a number of cases making reference to inflation most of them are simply rejections of comparisons with past verdicts, on the ground that subsequent, already demonstrated, inflation has made the comparison inapposite. None clearly accept the use of predictions as to future inflation. While we have found a case which may be read as speaking in terms of future inflation, *Southern Pacific Co. v. Zehnle* (9th Cir. 1947), 163 F.2d 453, and one which must be so regarded, *Brooks v. United States*, 273 F. Supp. 619 (1967) both rely exclusively on cases involving inflation already established. Particularly in considering predictions of an accumulated estate, which, if there is inflation, must be adjusted for possibly inflated expenses as well as earnings, we consider such speculation inadmissible."

The Eighth Circuit in one of its most recent cases on the subject of inflation, *Johnson v. Serra*, 521 F.2d 1289 (8th Cir. 1975) made the following observation:

> "The Federal Circuits that have faced the issue in cases involving federally created claims, governed by federal rather than state law, have for the most part rejected *testimony, jury instructions* or *trial court consideration* of future inflationary trends in damage assessments." (emphasis ours)

And in its original Opinion the Eighth Circuit recognized that expert testimony on future inflationary trends was speculative and inadmissible. The Court, however, went on in their original Opinion to answer the following question in the affirmative:

> "The fundamental question is thus whether the trier of fact may use his known understanding and experience in arriving at a damage figure where 'expert evidence' as to the precise calculation, factors and result involved in the question would be inadmissible."

That finding was in the Court's original Opinion and was withdrawn by per curiam order of the Eighth Circuit en banc leaving the Trial Court Opinion as the law in the case. Whether this Court looks to the decision of the Eighth Circuit Court of Appeals or that of the Trial Court, error is apparent. The Trial Court allowed the testimony of projected future inflationary trends and it used those projections in awarding damages for future wage losses. The Eighth Circuit held it was error to allow the introduction of the expert's testimony on future inflationary trends but state that it was permissible for the Trial Court to make its own projection based on no evidence whatsoever.

The cases from the other circuits cited above do not allow expert testimony as to the impact of future inflationary trends on future wage loss awards for the reason that those projections are too speculative. Neither do the above circuits allow the consideration by the trier of fact of future inflationary trends on damage awards for future wage loss. As pointed out so aptly by Judge Ross in his dissent in the original Opinion of the Eighth Circuit Court of Appeals in this case: "Economists have fared only slightly better that fortune tellers and soothsayers."

Whether the future will bring inflation or deflation is unknown. As Circuit Judge Edwards stated in *Sleeman v. Chesapeake & Ohio Railway Co.*, supra, at pg. 308, "The inflation versus deflation debate rages inconclusively . . ." The effect of allowing

the addition of inflation factors to damages awards can be seen in the present case. The Court's addition of 4% per year to the damage award for future wage loss increased the damages by approximately $78,000.00. That staggering sum of money was awarded based on a guess that the future would bring inflation and a guess that the amount of inflation the future would bring would be 4%.

The issue presented in this case is one of widespread importance in the federal courts of this country. The question of whether the impact of inflation or deflation may be considered in damage awards for future wage loss is raised daily in the federal courts in cases involving federally created claims. The decisions reached by the District Courts and the Circuit Courts are not in harmony. It is not right that parties litigating under the federally created claim should be exposed to a major, substantive difference in the law based merely on geography. If inflation is too speculative to service justice in one circuit, it is equally so in another. The decisions should be harmonized.

CONCLUSION

This Petition raises questions of far reaching impact in The Federal Admiralty Courts. The issues raised have not been decided by the Court and the decisions of the Courts of Appeal are not in harmony on either issue. For this reason, a Writ of Certiorari should issue to review the Judgment and Opinion of the Eighth Circuit.

Respectfully submitted

WILLIAM H. SUTTON
Attorney for Petitioner Medlin Marine, Inc.

APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

September Term, 1975

No. 75-1258

Mrs. Alana G. Heiman, etc., et al.,
Appellees,
vs.
Medlin Marine, Inc. Appellant.

No. 75-1287

Mrs. Alana G. Heiman, etc., et al.,
Appellees,
vs.
Marine Development Corp.,
Appellant.

No. 75-1383

Mrs. Alana G. Heiman, etc., et al.,
Appellees,
vs.
Medlin Marine, Inc., Appellant.

No. 75-1384

Mrs. Alana G. Heiman, etc., et al.,
Appellees,
vs.
Marine Development Corp.,
Appellant.

Appeals from the District Court for the Eastern District of Arkansas

Per Curiam

Before Gibson, Chief Judge, Lay, Heaney, Bright, Ross, Stephenson, Webster, and Henley, Circuit Judges

The prior panel opinion filed in these cases January 13, 1976 is ordered withdrawn.

The judgment of the United States District Court for the Eastern District of Arkansas is hereby affirmed by an equally divided Court.

April 14, 1976

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

Nos. 75-1258, 75-1287, 75-1383 and 75-1384

No. 75-1258

Appeal from the United States District Court for the
Eastern District of Arkansas

Mrs. Alana G. Heiman, in her own right; Sandra Jean Heiman, by Mrs. Alana G. Heiman, her mother and next friend, and H. Maurice Mitchell and Joseph W. Gelzine, Co-Administrators in Succession with Will Annexed of the Estate of Max Heiman, Deceased,

Appellees,

v.

Boatel Company, Inc., Marine Development Corporation,

and

Kohler Co.,

Appellee,

and

Medlin Marine, Inc.,

Appellant.

No. 75-1287

Appeal from the United States District Court for the Eastern District of Arkansas

Mrs. Alana G. Heiman, in her own right; Sandra Jean Heiman, by Mrs. Alana G. Heiman, her mother and next friend; and H. Maurice Mitchell and Joseph W. Gelzine, Co-Administrators in Succession with Will Annexed of the Estate of Max Heiman, Deceased,

Appellees,

v.

Boatel Company, Inc., Marine Development Corporation,

Appellant,

and

Medlin Marine, Inc. and Kohler Co.

No. 75-1383

Appeal from the United States District Court for the Eastern District of Arkansas

Mrs. Alana G. Heiman, in her own right; Sandra Jean Heiman, by Mrs. Alana G. Heiman, her mother and next friend, and H. Maurice Mitchell and Joseph W. Gelzine, Co-Administrators in Succession with Will Annexed of the Estate of Max Heiman, Deceased,

Appellees,

v.

Boatel Company, Inc., Marine Development Corporation, Kohler Co.,

and

Medlin Marine, Inc.,

Appellant.

No. 75-1384

Appeal from the United States District Court for the Eastern District of Arkansas

Mrs. Alana G. Heiman, in her own right; Sandra Jean Heiman, by Mrs. Alana G. Heiman, her mother and next friend; and H. Maurice Mitchell and Joseph W. Gelzine, Co-Administrators in Succession with Will Annexed of the Estate of Max Heiman, Deceased,

Appellees,

v.

Boatel Company, Inc.,

and

Marine Development Corporation,

Appellant,

Medlin Marine, Inc. and Kohler Co.

Submitted: October 17, 1975

Filed: January 13, 1976

Before Clark, Associate Justice,* Lay and Ross, Circuit Judges.

Lay, Circuit Judge.

This is an admiralty case brought by the Estate of Max Heiman, deceased, Mrs. Alana Heiman and Sandra Heiman against Boatel Company, Inc. (Boatel), the manufacturer of a yacht purchased in August, 1972 by Max Heiman. Boatel's retail franchise dealer, Medlin Marine, Inc. (Medlin), the air condi-

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* Associate Justice Tom C. Clark, United States Supreme Court Retired, sitting by designation.

tioning unit manufacturer, Marine Development Corp. (Marine), and the generator manufacturer, Kohler Company, were also sued.[1] The plaintiffs sought damages for the death of Max Heiman and for personal injuries to Mrs. Heiman and their daughter, Sandra, due to inhalation of carbon monoxide on September 1, 1973 while the Heimans slept on the yacht with the air conditioner running.

The evidence disclosed that the gasoline-powered generator created carbon monoxide and exhausted it at the stern below the water line. Immediately over the boat's exhaust outlet were four drainage holes which due to an overhang were not visible when the boat was in the water. The generator's need for air tended to create a vacuum, causing the exhausted fumes to be sucked through the four holes back into the engine compartment. The boat's engine compartment was separated from the living quarters by a non-airtight wall. Boatel installed the air conditioning unit near a passage leading to the engine compartment. When operating, the unit pulled air from that compartment, thereby introducing dangerous amounts of carbon monoxide into the living quarters.

Recovery was sought on the basis of negligence, breach of implied warranty and strict liability. The case was tried to the court, the Honorable Judge G. Thomas Eisele. The court's findings on liability were that:

1. Boatel, the yacht manufacturer, was negligent and was also liable in strict liability;

2. Marine Development, the air conditioning unit manufacturer, was negligent for failure to warn;

3. Medlin Marine, the retailer, was liable in strict liability, but was not negligent since there was no evidence that Medlin knew or should have known of the holes over the exhaust; and

---

[1] The defendants cross-complained against each other. Plaintiff dismissed its complaint against defendant Kohler, but the cross-complaints against Kohler remained.

4. Kohler, the generator manufacturer, had no duty to warn and was not otherwise negligent.

The court apportioned the fault between Boatel and Marine, finding that 80% was attributable to Boatel and 20% to Marine. The court held that Medlin was entitled to indemnity against Boatel for its entire liability. The court further found that the fault of Medlin and Marine was equal and denied any indemnity between those parties. Medlin and Marine appeal. Boatel, a bankrupt, did not defend below and takes no part in this appeal.

The principal issues on appeal are 1) the sufficiency of evidence to sustain Marine's liability for negligent failure to warn; 2) the question of indemnity between Medlin and Marine; and 3) whether the wrongful death damages awarded were based on proper evidence and were not otherwise excessive.[2]

Marine's Liability: Duty to Warn

At the conclusion of the trial, Judge Eisele filed detailed findings of fact and conclusions. The court found that the air conditioning unit was not mechanically or otherwise physically defective; that Boatel installed the air conditioning unit in violation of the installation instructions furnished by Marine; that there is nothing inherently dangerous in the use of properly installed air conditioning systems; and that had Boatel installed the system in accord with the instructions, the Heimans would not have been harmed.

Nonetheless, the trial court found Marine liable for its failure to warn Boatel and the Heimans of the potential consequences of improperly installing its air conditioning components. The trial court found:

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[2] Medlin noticed an appeal of the trial court's judgment that Kohler was not liable, but neither argued nor briefed this issue on appeal. Therefore we deem the appeal on this issue abandoned.

> . . . Marine Development Corporation knew or should have known that there were significant openings from the engine compartment into the living spaces . . . and that . . . carbon monoxide might, during the life of the vessel, be found in the engine compartment in dangerous concentrations.
>
> Marine Development also knew or should have known that if the forward cooling unit were installed as it was in the equipment room it could and would, under certain foreseeable circumstances, draw air from the engine compartment and circulate it throughout the living areas of the boat.
>
> Of all the parties to this action, Marine is and should be the most knowledgeable with respect to the effects of air-conditioning system and their operations. It has more than 50 percent of all the air-conditioning business in the class of boats and yachts of the approximate size of the Heiman vessel.
>
> It has held itself out as a specialist in marine air-conditioning . . .

The court further found:

> Marine, being so intimately associated with boat manufacturers and boat designers, knew or should have known that such manufacturers, for their own convenience and for design purposes, might install the cooling unit so as to have the effect of pumping air from the engine compartment.
>
> The potential seriousness of the injury which might result is obvious. In addition, there is no practical impediment to its ability to give an adequate warning. Carbon monoxide is odorless, colorless, and tasteless. It is insidious and subtle in its operation and effect. If there is any risk of it

being introduced into a living space, a warning of that risk should obviously be given.

The record reveals substantial evidence supporting these findings. We cannot say under the circumstances that the findings are clearly erroneous. It has long been held that a manufacturer is liable for foreseeable misuses of its product and for failure to warn of those misuses. *See Griggs v. Firestone Tire & Rubber Co.*, 513 F.2d 851 (8th Cir. 1975); *Hoppe v. Midwest Conveyor Co.*, 485 F.2d 1196, 1201 (8th Cir. 1973); *Larsen v. General Motors Corp.*, 391 F.2d 495, 504-05 (8th Cir. 1968).

The trial court correctly pointed out the basic distinction between the duty to give adequate instructions for the installation and use of a product and the duty to warn of hazards which might result from failure to follow those instructions. *See Buffington v. Amchem Products, Inc.*, 489 F.2d 1053, 1054-55 (8th Cir. 1974); *Ross v. Up-Right, Inc.*, 402 F.2d 943, 948 (5th Cir. 1968); L. Frumer & M. Friedman, Products Liability § 8.05[1] (1975). Thus, there can be no argument that the installation instructions were an adequate warning of the potential danger from improper installation of the unit.

Marine further urges that it had no duty to warn since Boatel had similar knowledge, and that the dangers of improper installation was common knowledge. It is also urged that a warning would have been futile since even after this accident, Boatel failed to relocate air conditioning units on similar boats. We think the evidence is sufficient to make these questions of fact, rather than of law.

The trial court found that Marine had superior knowledge of the operation of the air conditioning unit, that it held itself out to the public as a specialist in marine air conditioning and that it was totally familiar with boat construction. From this, the court reasonably inferred that Marine should have known of the danger that an improperly installed unit would act as a

pump, drawing the gases from the engine compartment, whereas Boatel did not possess such expertise and knowledge. The question of whether a warning to the boat manufacturer would have been futile is also a question to be resolved by the fact finder. A similar question arose in *Post v. American Cleaning Equipment Corp.*, 437 S.W.2d 516 (Ky. 1969), which involved an injury from an industrial vacuum cleaner bearing the instructions "only use on 115 volts AC or DC". The plaintiff plugged the unit into a 220 DC outlet and the issue was the adequacy of the instructions. In reversing a directed verdict for the defendant, the Kentucky Supreme Court stated:

> It is no answer to say that appellant would have attached the machine to a 220 DC outlet anyway, since he did so in face of the directions which were furnished. Maybe he would have, but the facts at hand make that a question of conjecture. One thing seems certain—IF the dire consequences of using 220 DC had been plainly and adequately posted—the appellee would prevail as a matter of law. The fact that reasonable differences of view may be reached as to the adequacy of the warning here makes this a jury case. . . .

437 S.W.2d at 521.

We conclude that there was sufficient evidence to support the trial court's finding that Marine Development Corporation was liable in both strict liability and negligence.

Indemnification

The court denied indemnification to Medlin, the retailer, as against Marine Development, the air conditioner manufacturer.[3]

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[3] The court also denied Marine's claim for indemnification against Medlin. Although Marine appealed from this judgment, it was neither argued nor briefed on appeal and therefore is waived and abandoned.

It did so even though Medlin was liable only under strict liability, while Marine's liability was based on negligence. The court reasoned that strict liability implied fault and thus considered the question as one of contribution rather than indemnification, concluding that the fault of Marine and Medlin was equal.

The Restatement of Restitution provides:

> A person who, without personal fault, has become subject to tort liability for the unauthorized and wrongful conduct of another, is entitled to indemnity from the other for expenditures properly made in the discharge of such liability.

Restatement, Restitution § 96 (1937).

The difference between primary and secondary liability is not based on a difference in degrees of fault. It rests rather on the nature of the legal obligation owed by the wrongdoer to the injured party. *See Tromza v. Tecumseh Products Co.*, 378 F.2d 601, 605-06 (3rd Cir. 1967).

We find no authority which would alter the traditional tests of indemnity under the circumstances. Medlin's responsibility is secondary when compared to Marine's. This is obvious from the finding that Medlin's fault is based only on strict liability and that none of Medlin's personnel knew or should have known the danger involved. Medlin's liability is vicarious and Marine must make Medlin whole.

We therefore find that the court erred in denying Medlin indemnity against Marine.

Damages

The trial court awarded the administrators of the decedent's estate the following amounts:

Alana G. Heiman, wife, $443,762.07,
Sanda Jean Heiman, daughter, $41,536.33,
Judith Heiman Samuel, daughter, $21,000.00,
Estate of Max A. Heiman, $5,906.85.

Marine and Medlin attack this verdict on the grounds that the trial court erred 1) in its method of determining contribution as an element of damage; 2) in admitting Mrs. Heiman's testimony concerning her living expenses subsequent to Mr. Heiman's death on the issue of contribution; 3) in considering a 5% to 6% managerial fee for the operation of apartments owned by Mr. Heiman; 4) in considering the decedent's tax records while he was employed by the Gus Blass Company; 5) in allowing an inflationary factor; and 6) in awarding excessive damages.

In awarding damages the trial court relied on the elements of damage in admiralty wrongful death cases set forth in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974).[4]

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[4] There the Court observed:

> Recovery for loss of support has been universally recognized, and includes all the financial contributions that the decedent would have made to his dependents had he lived. Similarly, the overwhelming majority of state wrongful-death acts and courts interpreting the Death on the High Seas Act have permitted recovery for the monetary value of services the decedent provided and would have continued to provide but for his wrongful death. Such services include, for example, the nurture, training, education, and guidance that a child would have received had not the parent been wrongfully killed. Services the decedent performed at home or for his spouse are also compensable.
>
> Compensation for loss of society, however, presents a closer question. The term "society" embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection. Unquestionably, the deprivation of these benefits by wrongful death is a grave loss to the decedent's dependents.
>
> * * * * * * *
>
> Finally, in addition to recovery for loss of support, services, and society, damages for funeral expenses may be awarded under the maritime wrongful death remedy in circumstances where the decedent's dependents have either paid for the funeral or are liable for its payment.

414 U.S. at 584-86, 591.

The basic attack relates to the damages awarded by reason of the alleged money contributions. Defendants contend that the award was excessive due to Mr. Heiman's deteriorating financial position. To aid our discussion we set forth in the margin the relevant part of Judge Eisele's detailed findings and conclusions.[5]

In assessing damages for wrongful death a trier of fact must make a reasonable extrapolation from the evidence of the amount necessary as compensation for the loss. At best this can only be an estimate of actual damage projected over a person's life expectancy. The trier of fact has a duty to consider the totality of the decedent's personality, work habits and character, his past and present earnings as well as his proven capacity to earn. All relevant evidence, past and present, which provides insight to the fact finder may be considered in arriving at a just verdict. To urge that one should not consider past income and past employment as reflected by tax returns, or that it is improper to consider uncompensated endeavors which might have contributed

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[5] Judge Eisele found:

> Although the status of Mr. Heiman's economic condition at the time of his death, based as it was upon income from a motel and from apartment complexes located in Arkansas and Florida, was precarious and deteriorating, it is likely that, had he lived, he would have salvaged at least some small part of his holdings. . . .
>
> . . . [A] fair interpretation of the evidence forces the Court to find that, had Mr. Heiman lived, he would have needed a combination of great effort and extremely good fortune to salvage even as much as a fourth of his overall holdings and that, realistically, it is more probable that, had he lived, Mr. Heiman would only have been able to extricate himself from his financial difficulties without any net personal obligation, salvaging only a small, perhaps even nominal, amount of his business holdings. The Court must analyze the probable "contributions" element of damages with this finding in mind.
>
> . . . . . .
>
> The evidence clearly establishes that Mr. Heiman was a man of business and executive ability. Before 1965 he had held positions of responsibility with one of the largest department stores in the State of Arkansas, the Gus Blass Company. The evidence from his W-2 forms indicates that his average an-

to growth in future net worth is to suggest verdicts based on incomplete evidence. To urge in a wrongful death case that the deecased's future earning capacity must be measured only in terms of his actual income at the time of his death ignores reality and benefits only the wrongdoer. The law of compensation does not function within such narrow constraints. We similarly disregard the attack on admission of the evidence of Mrs. Heiman's expenses after the accident. These were all relevant factors to be considered. The trial court, as any trier of fact, was entitled to make reasonable inferences from all of the evidence.

We have more difficulty with the admitted testimony of the economist. In *Riha v. Jasper Blackburn Corp.*, 516 F.2d 840 (8th Cir. 1975), this court reversed a jury verdict where an economist had projected a specific annual inflation rate over a person's work expectancy. We held this to be unduly speculative when the exact income was projected to the year 2005. *Riha* was followed by *Johnson v. Serra*, 521 F.2d 1289 (8th Cir.

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nual income for the last three years he was with the Gus Blass Company (1963, 1964 and 1965) was in excess of $20,000.00. The compensation for performing similar services in 1975 would obviously be considerably in excess of that figure. . . . This, then, is another of the bases upon which the Court's decision concerning the amount and the probability of future contributions must be predicated.

When Mr. Heiman got seriously involved in the real estate, motel and apartment building ventures, he devoted most of his time to personally overseeing such operations. He maintained an office with a secretary at the Holcomb Heights Apartments. It is true that he had on-the-site employees who looked after the routine operations, the collection of rents and maintenance. But, with the exception of the Fair Park Gardens, which were under a management arrangement with Block Realty Company, he contributed a considerable amount of his time to the overall management of the properties. The evidence indicates that, had Mr. Heiman not been performing these services, he would have had the alternative of contracting for such services with some real estate management company. The usual fee for such services would run in the neighborhood of five to six percent of the gross receipts. Of course, such a firm would

1975), where in a wrongful death action we excluded testimony of an economist's projection of an eight per cent inflation rate over the decedent's work expectancy to the year 2002. In both cases, we followed the Sixth Circuit's decision in *Bach v. Pennsylvania Central Transportation Co.*, 502 F.2d 1117 (6th Cir. 1974). We approved language from *Bach* which indicated that "[s]ome consideration of probabilities is inevitable in any fair award of damages." 516 F.2d at 845, *quoting* 502 F.2d at 1122.

Our opinions in *Riha* and *Johnson* were not intended to preclude use of economists as experts to testify on probable wage increases over reasonable periods of time or on inflationary or deflationary factors of the past and their general relevance to the future. In *Riha* we held, consistent with Nebraska law and prior federal cases, that the precise mathematical projection by the economist using an inflation factor of seven per cent to the year 2005 was too conjectural. We held that the expert witness was not competent to testify, within any acceptable range of probability, that a precise inflationary rate would continue for

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have had to pay the management expenses and wages of the on-the-site employees out of its fees. Looking at Mr. Heiman's tax records covering his various operations over a period of years, the Court finds that he was performing services which, had they been contracted, would have required the payment of at least $20,000 per year over and above the management and employee expense actually experienced.

. . . Looking at both Mrs. Heiman's testimony as to her actual expenses since Mr. Heiman's death and the tax records and other records kept by Mr. Heiman reflecting contributions prior to his death, the Court finds that on an average Mr. Heiman was contributing just under $30,000 to the living expense requirements of the entire family. In making this determination, the Court has disregarded certain items, such as jewelry expenditures, from the figures testified to by Mrs. Heiman on the one hand, and, on the other hand, has reduced the figures revealed by Mr. Heiman's records by the amounts of the insurance premiums, the boat expense, and certain other expenses. Had he lived, Mr. Heiman's own living expenses would have had to be defrayed out of the total living expense contributions. Furthermore, if, as the Court suspects, financial circumstances

so long. The rate of inflation depends on many collateral considerations such as war and peace, tax rates, the state of the general economy, interest rates and myriad other extrapolations. The science of economics is too imprecise at present for its experts to offer more than speculative guesses as to the state of the economy for the future. As we stated in *Johnson*:

> Inflationary forecasts of economists are, of course, only personal opinions, even when based on past trends. It must be recognized that trends may often be faulty indicators of the future as well as the present and that economists have fared only slightly better than fortune tellers and soothsayers in foretelling the future. Economic factors operate at varying degrees of intensity in our economy, and it seems there are as many explanations of past trends and predictions of future trends as there are economists. We could be entering into an inflationary cycle with its attendant depreciation of the dollar or into a deflationary era, as in the 1930's. Both possibilities are to a considerable extent speculative and conjectural.

521 F.2d at 1294.

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would have required Mr. Heiman to accept employment from a third-party employer, he would, of course, have had to pay state and federal income taxes on his compensation, a situation which would be entirely different from the tax situation which had existed in the years immediately prior to his death where, because of the nature of his investments and the tax laws involved, he was not required to pay such taxes.

The court is convinced that, had Mr. Heiman lived, he and his family would have had to cut down somewhat on their overall style of living but would still have been able to live most comfortably.

From all the evidence, the Court finds that through one method or another Mr. Heiman, had he lived, would have been able to provide and would in fact have provided contributions and support to the other members of his family (i.e., excluding himself) in the sum of $22,500.00 per year, measured in 1975 dollars, over the remaining working years of his life.

The dangers of allowing the expert to make such "guesses", even though subjected to cross-examination, is that it leads to protracted litigation of collateral issues without reasonable boundaries and allows unreliable conjecture to be conveyed in terms of mathematical certainty.

Consistent with our rulings in *Riha* and *Johnson*, we think that in the instant case it was error for the trial court to receive into evidence the economist's projection of Mr. Heiman's contributions over his work life expectancy using a 5½% inflation rate. Whether this error requires a reversal and remand to the district court, however, necessitates further analysis.

In the present case the trial judge, rather than a jury, served as the trier of fact. The essential difference between a bench trial and a jury trial is that the trial judge's verdict is supported by specific findings of fact which must withstand analysis under the clearly erroneous test. As such, a trial judge's conclusion is more vulnerable on review than the jury verdict which will be sustained upon demonstration of substantial evidence to support the verdict. *See Oil Screw Noah's Ark. v. Bentley & Felton Corp.*, 322 F.2d 3, 5-6 (5th Cir. 1963); *cf. Jackson v. Hartford Accident & Indemnity Co.*, 422 F.2d 1272, 1278 (8th Cir. 1970) (concurring opinion, Lay, J.). The jury's methodology in reaching its verdict is, of course, inherent in the verdict and is not subject to collateral attack. *Chicago, R. I. & Pac. R. R. v. Speth*, 404 F.2d 291 (8th Cir. 1968).

Nonetheless, in the instant case, the trial judge has set forth his factual findings, which clearly show that the court rejected the economist's analysis and applied his own understanding and experience of inflationary impact on future contributions. Judge Eisele in rejecting the economist's testimony used a 5½% present value discount rate and then applied an inflationary factor of 4%, resulting in a discount of the projected earnings by 1½%. The economist estimated loss of future contributions to Mrs. Heiman as $760,276; Judge Eisele's figure was $350,910.

The fundamental question is thus whether the trier of fact may use his own understanding and experience in arriving at a damage figure where "expert" evidence as to the precise calculation, factors and result involved in the equation would be inadmissible.

In our prior opinions we have approved the following language from *Bach:*

> Even though no expert testimony on inflation and future increases was admitted, it was still error for the district court to charge the jury that it should not consider "future increases or decreases in the purchasing power of money." *Cf.* Willmore v. Hertz Corporation, 437 F.2d 357 (6th Cir. 1971). Inflation is a fact of life within the common experience of all jurors. Admittedly, if the jury considers this issue without expert testimony, their calculations will be even more imprecise. There is always a chance that the verdict may be too generous. But if jurors should be prohibited from applying their common knowledge of inflation in reaching a verdict, the party entitled to recovery could be grievously under-compensated. The court can always rectify an exorbitant verdict through its power of remittitur. See 6A Moore's Federal Practice ¶ 59.05[3].

502 F.2d at 1122, quoted in 516 F.2d 845.

Thus we are committed to the rule that although an expert witness may not project an inflationary rate over a person's life expectancy, the trier of fact may consider future increases or decreases in the purchasing power of money. As indicated in *Bach*, even though a jury's opinion, like the economist's, may be imprecise, the ultimate check on their extrapolation is whether the verdict is exorbitant. Thus, we hold in the present case it was not error for the trial court, sitting as a trier of fact, to consider an inflationary impact on the damage award based on his own understanding and experience. The remaining question we must face then is whether the damage award is excessive.

The fundamental tests of whether a verdict is excessive are whether it falls within the reasonable range of the evidence and whether it is shocking to the conscience. *Krall v. Crouch Bros., Inc.*, 473 F.2d 717, 719 (8th Cir. 1973); *O'Brien v. Stover*, 443 F.2d 1013, 1018-19 (8th Cir. 1971); *Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, 447-48 (8th Cir.), *cert. denied*, 368 U.S. 929 (1961). The first is an objective test, the latter a subjective evaluation by the judges of this court. As we have discussed the verdict falls within a reasonable range of the evidence. The projected earnings of the deceased were established at $22,500 whereas there was evidence that in the past Heiman earned more than this. Further, in evaluating the totality of this proof and the circumstances surrounding Mr. Heiman's contributions to his wife and family, we do not find the verdict shocking.

The judgments for the plaintiffs are affirmed as against Marine and Medlin; the judgment denying the cross-complaint of Medlin against Marine is reversed and the district court is directed to enter judgment in favor of Medlin on its claim for indemnity against Marine; the judgment in favor of Kohler on the cross-complaint is affirmed. Costs of plaintiffs and Medlin shall be assessed to Marine; Kohler shall pay its own costs.

Ross, Circuit Judge, Dissenting.

I respectfully dissent. The result reached by the majority gives proof to the old saw that hard cases make bad law. The death and injuries in this case were the result of negligence and defective design of the Heiman yacht by Boatel; however, Boatel is bankrupt and unable to respond in damages. Under the law of strict liability and implied warranty the dealer who acted as an intermediary between Boatel and the decedent Medlin is liable, even though it cannot be said that Medlin was at fault in any traditional sense of the word. In this case it is harsh that Medlin cannot be indemnified by Boatel, but that

should not be justification to stretch the law of torts in order to impose liability on a party who is just as innocent of fault: Marine Development, the manufacturer of the air conditioning components.

The components supplied by Marine Development were not defective, and had they been installed as the manufacturer instructed, they would not have been dangerous. However, Boatel installed the air conditioning system on the Heiman yacht in such a way that one cooling unit's air intake was from the engineroom, and not surprisingly, the engineroom air contained, at the time of the accident, carbon monoxide.

There is no duty to warn of obvious dangers under either negligence or strict liability theory. *Ward v. Hobart Manufacturing Co.*, 450 F.2d 1176, 1188 (5th Cir. 1971); *Posey v. Clark Equipment Co.*, 409 F.2d 560, 563 (7th Cir.), *cert. denied*, 396 U.S. 940 (1969); W. Prosser, The Law of Torts 649 (4th ed. 1971); Restatement (Second) of Torts § 388, comment *k*; *see Kerber v. American Machine & Foundry Co.*, 411 F.2d 419, 421-422 (8th Cir. 1969); Restatement (Second) of Torts, § 402A, comments *i, j*. As Chief Judge Gibson stated in *Larsen v. General Motors Corp.*, 391 F.2d 495, 505 (8th Cir. 1968), cited by the majority:

> Almost any chattel or commodity is capable of inflicting injury; knives cut, axes split, dynamite explodes, food spoils, poison kills. Where the danger is obvious and known to the user, no warning is necessary and no liability attaches for an injury occurring from the reasonable hazards attached to the use of chattels or commodities; but where the dangerous condition is latent it should be disclosed to the user, and non-disclosure should subject the maker or supplier to liability for creating an unreasonable risk.

I believe that as a matter of law Marine Development was not liable here, because the installation of the airconditioner in a

manner which permitted the introduction of carbon monoxide into the unit's air intake was an obvious danger and a manufacturer is entitled to assume that his product will not be used in an obviously dangerous manner. *Marker v. Universal Oil Products Co.*, 250 F.2d 603, 606-607 (10th Cir. 1957); *see Brown v. General Motors Corp.*, 355 F.2d 814, 819-821 (4th Cir. 1966), *cert. denied*, 386 U.S. 1036 (1967). This is so *a fortiori* where the product is merely a component which is to be incorporated into a system by technicians and engineers, as Boatel's personnel were here. *Jacobson v. Colorado Fuel & Iron Corp.*, 409 F.2d 1263, 1273 (9th Cir. 1969). The majority has come dangerously close to making the manufacturer an insurer in this case. I would reverse on the issue of Marine Development's liability.

I also dissent from the affirmance of the award of over half a million dollars in damages. It is inconceivable to me how—when "economists have fared only slightly better than fortune tellers and soothsayers" and the prediction of inflationary or deflationary trends by an expert is "to a considerable extent speculative and conjectural"—we can allow a federal judge to do what the acknowledged experts in the field cannot; that is to project a specific annual inflation rate over a person's life expectancy. As we recognized most recently in *Johnson v. Serra*, 521 F.2d 1289, 1295-1296 (8th Cir. 1975): "The federal circuits that have faced the issue in cases involving federally created claims, governed by federal rather than state law, have for tne most part rejected * * * trial court consideration of future inflationary trends in damage assessment." (Footnote omitted.) In *Johnson* we indicated we would probably follow the majority rule in a case applying federal law, such as this admiralty claim. *Johnson v. Serra*, supra, 521 F.2d at 1295. The majority goes further today than we went in *Riha v. Jasper Blackburn Corp.*, 516 F.2d 840, 843-845 (8th Cir. 1975). Certainly it goes further than we said we would go in *Johnson*.

I also have grave doubts about some of the matters considered by the trial court in computing the contributions Mr. Heiman would have made to his family. These included: 1) consideration of the salary the decedent had earned eight to ten years before his death in a business unrelated to his livelihood at the time of the accident, 2) consideration of a "management fee" of 5-6% of the value of apartments owned and operated by the decedent after finding that he probably would have lost 75% of those real estate holdings, had he lived, 3) considering living expenses of the Heiman family which were incurred after Mr. Heiman's death in order to show what the decedent would have been able to contribute.

Under the circumstances, I do not think an award of over $512,000 was appropriate. Accordingly, I would remand this case to the district court with directions to dismiss Marine Development as a defendant and for reconsideration of the question of damages.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

In the United States District Court
Eastern District of Arkansas
Western Division

Mrs. Alana G. Heiman in Her Own Right; Sandra Jean Heiman, by Mrs. Alana G. Heiman, Her Mother and Next Friend; and H. Maurice Mitchell and Joseph W. Gelzine, Co-Administrators in Succession With Will Annexed of the Estate of Max Heiman, Deceased,

Plaintiffs,

v. No. LR-73-C-261

Boatel Company, Inc., Marine Development Corporation, and Medlin Marine, Inc.,

Defendants,

Kohler Co.,

Third-Party Defendant.

Memorandum Opinion

The defendants, Medlin Marine, Inc. and Marine Development Corporation, have now submitted very able briefs to the Court, arguing their differing views concerning the law of indemnity and contribution as applied to the findings and conclusions heretofore made by the Court. The issues tendered have become of utmost important to the parties because of the bankruptcy of the defendant manufacturer, Boatel Company.

The very strong and immediate reaction of the Court upon reading the briefs of these two parties is that neither result contended for would work justice in this case. On the contrary, to accept the position of either would, in the opinion of the Court,

result in an extremely unjust apportionment of the financial responsibility arising out of the joint and several liability of these defendants to the plaintiffs. It is true that the Court has heretofore apportioned the fault predicated upon negligence as between the two defendants held to be negligent, i.e., Boatel and Marine Development, but it has not made any determination of the comparative fault between the defendant Medlin and the defendant Marine, or any other defendant. The basic fallacy of Marine's position is that Medlin, because of its legal relationship with Boatel, should at the very least stand in the shoes of Boatel in terms of any apportionment of fault. From all that has been said in open court and in the prior Memorandum Opinion, it should be quite clear that, on any scale, the fault of Boatel far exceeded that of Medlin. On the other hand, the error of Medlin is in assuming, because of the Court's finding that Medlin's liability was one based simply upon Medlin's legal position as the retailer of the boat, that Medlin is "without fault". The truth is that the law of strict liability implies fault. Medlin chose to deal with Boatel and to place the latter's products in the hands of the public. In other words, Medlin sells to the public instrumentalities which, if they are defective, have a great potential for harm. The policy of the law is indeed reflected in the very theory of strict liability.

After analyzing the precedents cited by both Medlin and Marine the Court is convinced that we are dealing with a problem of contribution among tortfeasors rather than the question of tort indemnity. The problem, however, is that we are called upon to compare the fault of one held liable on a theory of strict liability with the fault of another held liable on a theory of negligent failure to warn.

One thing is clear from the facts of the case: the principal "culprit", the principal wrongdoer in this tragedy, was obviously Boatel. Whether you examine Boatel's responsibility on the basis of strict liability, implied warranty, or negligence, that

liability and its predominating causative relationship to the death and injuries here is obvious, clear and certain. If it is open to the Court to determine where the loss should rest as between the two other defendants, whose fault is so much less, relatively, than Boatel, then the Court would find it most difficult to find greater fault on the part of one than on the other, viewing "fault" in the light of the facts and the policies and attitudes reflected in the law concerning negligence and strict liability.

After examining the precedents submitted, the Court has concluded that it is open to the Court to apportion the loss between the two financially responsible defendants in accordance with the facts of the case. Those facts have been adequately found and treated by the Court from the bench and in the prior written memorandum. From a review thereof, the Court concludes that the fault of Marine and Medlin is equal.

Dated this 5th day of May, 1975.

/s/ GARNETT THOMAS EISELE
United States District Judge

APPENDIX D

In the United States District Court
Eastern District of Arkansas
Western Division

Mrs. Alana G. Heiman in her own right; Sandra Jean Heiman, by Mrs. Alana G. Heiman, Her Mother and Next Friend; and H. Maurice Mitchell and Joseph W. Gelzine, Co-Administrators in Succession With Will Annexed of the Estate of Max Heiman, Deceased

Plaintiffs

v. No. LR-73-C-261

Boatel Company, Inc., Marine Development Corporation, and Medlin Marine, Inc.

Defendants

Kohler Co.

Third-Party Defendant

Memorandum Opinion

Although the trial of this cause lasted about ten days, most of the basic facts are undisputed as will be revealed by an examination of the record. Because of the pressure of time and judicial business, the Court must content itself with making the essential findings with respect to disputed issues of fact and the necessary conclusions of law, providing in the process only a minimum of background information.

On September 1, 1973, Mr. Max Heiman, Mrs. Alana Heiman, his wife, and Miss Sandra Heiman, his daughter, went on an outing in Mr. Heiman's 47 ft. Islander yacht on the Arkansas River. On leaving the Little Rock Yacht Club, Mr. Heiman radioed Mr. Harry Ehrenberg, who was upriver in his

own boat and who had previously recommended a beach rendezvous site to Mr. Heiman. Mr. Heiman asked Mr. Ehrenberg how to get to the site, which was located one-quarter to one-half mile past Palarm Creek on the way up the river. Mr. Ehrenberg advised that it was somewhat difficult to find, and he therefore volunteered to take his runabout out onto the river and lead Mr. Heiman to the island where other boats had already assembled. This he did, and Mr. Heiman brought his boat to the island and beached it to the south of the other yachts. There were approximately five boats in all that were beached along the east side of the island. Mr. Heiman's was the southernmost. The bow of the boat rested on a very gentle slope in a manner which did not lower the rear of the boat more than two or three inches further down in the water than it would be if floating free.

That evening before dinner, the Heimans came ashore and visited others on the boats to the north of them. The various groups then returned to their own boats to dine. After dinner the Heimans watched a football game and thereafter Mr. Heiman came ashore again and walked his dog. He told Mr. Ehrenberg that he did not wish to go fishing the next day, but intended to rest. The Heimans retired about 10:30 on the evening of September 1.

On the morning of September 2, the Ehrenbergs and others in the group were fishing and visiting up and down the line of boats and getting ready for a fish fry. Later on, Mrs. Ehrenberg became concerned since she had not observed any activity on the Heiman boat. She insisted that Mr. Ehrenberg go over to the boat to invite them to join the others. Mr. Sam Winstead and Mr. Ehrenberg boarded the Heiman yacht, but could not arouse anyone or open the door. Mr. Winstead pried the sliding glass door open with a screwdriver, and he and Mr. Ehrenberg rushed in. Mr. Winstead turned off the generator, and they both then ran out for air. They immediately re-entered and

found Mr. and Mrs. Heiman on the two beds in the rear living compartment. Mr. Heiman was apparently dead. They managed to get the Heimans out on the open deck. Mrs. Heiman rolled her eyes and Sandra spoke once, but each then lapsed back into a coma. Since Mr. Winstead had the fastest boat, the Heimans were placed upon it and it returned with them to the Little Rock Yacht Club. The Heiman yacht was piloted back to the Little Rock Yacht Club by Mr. Dick Herget, who entered the Heiman vessel with a deputy sheriff. Everyone was instructed not to disturb anything on the boat. When the boat was back at the Little Rock Yacht Club, Mr. Herget locked it and delivered the keys to Mr. Buddy Payne. Mr. Payne kept the boat locked thereafter, only opening it at the direction of the attorneys.

Contributory Negligence of Mr. and Mrs. Max Heiman and Sandra Heiman

The defendants have contended that Mr. and Mrs. Max Heiman and Sandra Heiman were contributorially negligent. A contrary finding has already been made of record in open court. An additional point, probably, needs to be made. The defendants suggest that if the craft is anchored in open water it will weathervane with the wind and this would avoid the precise problem which occasioned the death of Mr. Heiman and the injuries of Mrs. Heiman and Miss Sandra Heiman. The short answer to this is that all who were involved in the manufacture, sale and operation of such craft knew, and know, that they will be frequently beached for recreational purposes rather than anchored in open water. Further, if the carbon monoxide hazard was known, or should have been known, and the safeguard against same was to be the requirement that the boat always be anchored in open water where it could freely pivot 360 degrees, then obviously a clearcut instruction and warning to this effect would be required. None was given or suggested.

Boatel Liability

The Court made most of its findings of fact and conclusions of law with respect to the liability of the various parties in open court the day after the conclusion of the trial. The following findings and conclusions are supplementary to those stated from the bench and must be read in conjunction therewith to be properly understood.

The defendant Boatel Company, Inc. sold its product, the 47 ft. Islander, to the defendant Medlin Marine, Inc. in defective condition, unreasonably dangerous to the potential purchaser and likely users. At the time of the sale, Boatel was engaged in the business of selling boats and yachts, and the 47 ft. Islander yacht which was sold by it to Medlin Marine, Inc. and thence to Mr. Max Heiman was a standard production item. As was expected, the boat did reach the purchaser, Mr. Max Heiman, and the other likely users of that boat, without substantial change in the condition from that which existed at the time it left the manufacturing plant in Mora, Minnesota. The product was so dangerous and hazardous, as delivered to Medlin Marine and as delivered to Mr. Max Heiman, that no prudent manufacturer or seller would have marketed it had it been aware of the defective conditions and their potential. The defective conditions have heretofore been stated in open court, and those conditions were proximate causes of the death of Mr. Max Heiman and the injuries sustained by Mrs. Alana Heiman and Miss Sandra Heiman.

Kohler Liability

On the day after the completion of the trial, the Court made findings of fact and conclusions of law with respect to various liability issues. It concluded that Marine Development Corporation was liable to the plaintiffs, but it did not make a determina-

tion as to the liability of the Kohler Company. Rather, the Court on that occasion made certain factual findings concerning the role of the Kohler Company, but expressly reserved the issue of Kohler's liability for further study. At this time the Court supplements its findings of fact and conclusions of law with respect to Kohler's liability as follows:

The third-party defendant, Kohler Company, knew, or had reason to know or believe, that its gasoline-driven generator would be installed in the engine compartment of a boat manufactured by Boatel and, further, that such boat would have sizeable holes or openings in the forward wall of the engine compartment. Kohler also knew, or had reason to know or believe, that its generator unit might very likely be integrated with, and used together with, a recirculating air conditioning system. Kohler also knew, or had reason to know or to believe, that leaks do occasionally develop in the exhaust systems of marine generator engines resulting in the direct discharge of carbon monoxide into the engine compartment. It also knew that these leaks could occur through accident or ordinary wear and tear. And, of course, it is undisputed that Kohler sold the engine that produced the carbon monoxide that resulted in the death and injuries in this case, and Kohler was fully aware of the fact that its engine would produce carbon monoxide and that that gas was potentially lethal.

The only real liability question in connection with Kohler is whether it had a duty to warn and, then, if it did have such a duty which it failed to discharge, was the breach of that duty a proximate cause of the death and injuries in this case?

There was evidence in this case that carbon monoxide in the engine compartment would probably diffuse and flow through the openings in the engine compartment forward wall whether there was an air conditioning system on the boat or not. There is even testimony that if there were lethal concentrations of carbon monoxide in the engine compartment that lethal concentra-

tions would eventually build up in the living compartments even in the absence of an air conditioning system. In the Court's judgment, however, the evidence did not, and does not, support a finding that concentrations of carbon monoxide which would be hazardous to life or health would penetrate into the living areas of a boat in the absence of an improperly installed air conditioning system.[1] When the generator engine is operating, it creates a negative pressure in the engine compartment since it demands a source of air and oxygen. Of course, if there were a sufficient leak directly from the exhaust system into the engine compartment, positive pressures could be created which could result in an out-flow of carbon monoxide into the living quarters.

The key question here is whether the Kohler Company had reason to know, understand, and believe that the presence of carbon monoxide in the engine compartment could be potentially hazardous to the occupants and users of the boat in the living compartments of the boat. If so, it could be argued that it should have warned against any foreseeable circumstance which would permit the introduction of carbon monoxide into that engine compartment, and, again if it had that knowledge, then it should warn the manufacturer and the potential users of the potential, through accident or wear and tear, of a leak developing in the exhaust system *within* the engine compartment, and it would also have a duty to warn the boat manufacturer not to create entryways from outside of the boat in the vicinity of the exhausts which would permit the *reintroduction* of the carbon monoxide into the engine compartment. Here, Kohler argues, in effect, that it gave such a warning when its manual stated, "never put inlets in the transom." It has already been stated in open court that this language would avail Kohler little because,

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[1] It should be noted, and the Court so finds, that there is no significant difference in the airflow situation in the case of a properly installed recirculating air conditioning and heating system from that which obtains in the complete absence of an air conditioning and heating system.

taken in appropriate context, it obviously referred to the proper construction of the ventilation system, and the inlet ventilators, which are designed to operate while the boat is in motion, obviously would not work if installed on the transom. But, even assuming the language was intended to guard against the very thing that Boatel in fact did here, was it adequate as a *warning* as contrasted to its adequacy as a construction instruction? If this were the sole issue, the Court would have to resolve it against Kohler in the same fashion that it resolved a similar argument against Marine Development Corporation, because, clearly, the language does not suggest in any way the potential hazard to life and health that might result from the failure to follow the instruction.

All this brings us back to the most difficult question: knowing that carbon monoxide might be in the engine compartment as a result of the operation of its generator engine at some time during the life of the boat, and knowing that there were openings from the engine compartment communicating directly with the living areas of the boat, did Kohler have a duty to warn Boatel not to put holes in the exterior of the boat in the vicinity of the engine exhausts, which holes would directly communicate with the engine compartment, and to further point out that to do so might have the effect of producing death or injuries to those occupying the living spaces of the boat? The answer to this question must turn on the further question: did Kohler know, or should it have known, that an air conditioning system, improperly installed, or however installed, might pump carbon monoxide out of the engine compartment and into the living areas of the boat? On the basis of the evidence, the Court must find that Kohler did not know of this effect (indeed, none of the parties did until after the accident) and it further finds and concludes that it had no duty to know, or reason to know, of this potential. To hold otherwise would charge the manufacturer of a generator with the unreasonable requirement of having to be intimately aware of the tendencies and propensities

and nature of *all* appliances and systems that might take electric energy from a generating unit. The Court concludes, while recognizing that the question here is a close one, that the law does not go that far and, therefore, that Kohler had no duty to warn Boatel which could form a predicate for liability against it in this case.

Upon the basis of the same analysis, the Court must conclude that Kohler had no duty to warn or recommend that the bilge blower be operated continuously when the generator engine or the other engines were operating and the boat was *not* under way. Until the post-accident analysis of this case, at any rate, the purpose and function of the bilge blower was considered by all to be simply a method of *ventilating* the engine compartment for the purpose of eliminating potentially explosive fumes. It was not conceived by anyone that it would have any relationship to the potential carbon monoxide problem.

Damages

The United States Supreme Court in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 584, states that, under the maritime wrongful-death remedy, the decedents dependents may recover damages "for the loss of support, services, and society, as well as funeral expenses". It then goes on to discuss these elements of damages:

> "Recovery for loss of support has been universally recognized, and includes all the financial contributions that the decedent would have made to his dependents had he lived. Similarly, the overwhelming majority of state wrongful-death acts and courts interpreting the Death on the High Seas Act have permitted recovery for the monetary value of services the decedent provided and would have continued to provide but for his wrongful death. Such services include, for example, the nurture, training, education, and

guidance that a child would have received had not the parent been wrongfully killed. Services the decedent performed at home or for his spouse are also compensable.

"Compensation for loss of society, however, presents a closer question. The term 'society' embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection. Unquestionably, the deprivation of these benefits by wrongful death is a grave loss to the decedent's dependents."

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"Finally, in addition to recovery for loss of support, services, and society, damages for funeral expenses may be awarded under the maritime wrongful-death remedy in circumstances where the decedent's dependents have either paid for the funeral or are liable for its payment."

As a footnote to its discussion of "loss of society", the Court made it clear that this element should not be confused with mental anguish or grief which are *not* compensable under the maritime wrongful-death remedy. It states that loss of society "entails the loss of positive benefits", while mental anguish or grief "represents an emotional response to the wrongful death".

A "dependent" for our purposes may be such beyond his or her legal majority and may be such independent of the legal responsibilities imposed by state law. This is particularly so with respect to certain "unfinished business" in the maturation process such as advanced, college-level education. Where the evidence discloses the intent and ability to pursue such an education on the part of a child of the decedent and the concomitant determination to, and ability to, provide such educational opportunities on the part of the decedent himself, then that child would remain a "dependent" for such purposes until completion of the educational process.

A. **Contributions**

From the evidence it is clear beyond question that Mr. Heiman was an exceptional person and an ideal husband and father. He occupied an important place in the civic and business life of the Little Rock community and the highest positions of lay leadership in his church. He was devoted to his wife and his daughters and always put their interests first. He was concerned with their welfare and did his utmost to shield them from life's difficulties and vicissitudes. He had an intense personal interest in the education of his daughters. He was a "family man" in the sense that his whole life revolved about his wife and daughters. The members of the family spent much more of their "free" time enjoying the companionship of each other than one would expect in the average family.

Although the status of Mr. Heiman's economic condition at the time of his death, based as it was upon income from a motel and from apartment complexes located in Arkansas and Florida, was precarious and deteriorating, it is likely that, had he lived, he would have salvaged at least some small part of his holdings. Mr. Heiman had broad family and personal contacts with influential and wealthy businessmen throughout the country, and he also had what appears to be an unusual ability to borrow money, considering the status of his overall financial condition. This is dramatically illustrated by the evidence indicating that he had arranged an additional $100,000 loan just a few days prior to his death.

Nevertheless, a fair interpretation of the evidence forces the Court to find that, had Mr. Heiman lived, he would have needed a combination of great effort and extremely good fortune to salvage even as much as a fourth of his overall holdings and that, realistically, it is more probable that, had he lived, Mr. Heiman would only have been able to extricate himself from his financial difficulties without any net personal obligation, salvaging only a small, perhaps even nominal, amount of his busi-

ness holdings. The Court must analyze the probable "contributions" element of damages with this finding in mind.

Mr. Heiman can be considered a victim of the times in the sense that practically all of the overall financial conditions and circumstances affecting the success of such investments went sour at about the same time. Beyond that, he possibly did not retrench when he should have. His concern for and interest in his family, and his hope, based more upon wish than reality, led him into the practice of using cash flow from depreciation as the basis for contributions to his family and his own living expenses. As a result, when conditions began to approach the critical stage, he did not have the necessary reserves to fall back upon to tide him over. This left him with only one possible recourse: to borrow more, and this alternative would itself become increasingly more difficult.

The evidence clearly establishes that Mr. Heiman was a man of business and executive ability. Before 1965 he had held positions of responsibility with one of the largest department stores in the State of Arkansas, the Gus Blass Company. The evidence from his W-2 forms indicates that his average annual income for the last three years he was with the Gus Blass Company (1963, 1964 and 1965) was in excess of $20,000. The compensation for performing similar services in 1975 would obviously be considerably in excess of that figure. The evidence of his ability to command executive-level compensation from third-party employers is clear and convincing. This, then, is another of the bases upon which the Court's decision concerning the amount and probability of future contributions must be predicated.

When Mr. Heiman got seriously involved in the real estate, motel and apartment building ventures, he devoted most of his time to personally overseeing such operations. He maintained an office with a secretary at the Holcomb Heights Apartments.

It is true that he had on-the-site employees who looked after the routine operations, the collection of rents, and maintenance. But, with the exception of the Fair Park Gardens, which were under a management arrangement with Block Realty Company, he contributed a considerable amount of his time to the overall management of the properties. The evidence indicates that, had Mr. Heiman not been performing these services, he would have had the alternative of contracting for such services with some real estate management company. The usual fee for such services would run in the neighborhood of five to six percent of the gross receipts. Of course, such a firm would have had to pay the management expenses and wages of the on-the-site employees out of its fees. Looking at Mr. Heiman's tax records covering his various operations over a period of years, the Court finds that he was performing services which, had they been contracted, would have required the payment of at least $20,000 per year over and above the management and employee expense actually experienced.

It is clear from the evidence that Mrs. Heiman had no knowledge of her husband's business affairs prior to his death, and it is also clear that Mr. Heiman shielded her from even the routine responsibilities of paying household bills and expenses. Therefore, she personally kept no records of, and has no knowledge of, the contributions made to her and the family prior to Mr. Heiman's death. The executors have found records kept by Mr. Heiman, however, which provide some insight into the contributions made to the family over recent years. In addition, Mrs. Heiman has kept an accurate record of her expenses since Mr. Heiman's death, and has testified that those expenditures have been in line with, and certainly not more than, those incurred in prior years. Looking at both Mrs. Heiman's testimony as to her actual expenses since Mr. Heiman's death and the tax records and other records kept by Mr. Heiman reflecting contributions prior to his death, the Court finds that on an average Mr. Heiman was contributing just under $30,000 to the living

expense requirements of the entire family. In making this determination, the Court has disregarded certain items, such as jewelry expenditures, from the figures testified to by Mrs. Heiman on the one hand, and, on the other hand, has reduced the figures revealed by Mr. Heiman's records by the amounts of the insurance premiums, the boat expense, and certain other expenses. Had he lived, Mr. Heiman's own living expenses would have had to be defrayed out of the total living expense contributions. Furthermore, if, as the Court suspects, financial circumstances would have required Mr. Heiman to accept employment from a third-party employer, he would, of course, have had to pay state and federal income taxes on his compensation, a situation which would be entirely different from the tax situation which had existed in the years immediately prior to his death where, because of the nature of his investments and the tax laws involved, he was not required to pay such taxes.

The Court is convinced that, had Mr. Heiman lived, he and his family would have had to cut down somewhat on their overall style of living but would still have been able to live most comfortably.

From all the evidence, the Court finds that through one method or another Mr. Heiman, had he lived, would have been able to provide and would in fact have provided contributions and support to the other members of his family (i.e., excluding himself) in the sum of $22,500.00 per year, measured in 1975 dollars, over the remaining working years of his life.

The plaintiffs put in evidence experience tables showing a 23.3 year life expectancy for a 48-year-old man. There was evidence indicating that Mr. Heiman had in the past suffered a heart attack, but there is no indication that he was not enjoying reasonably good health just prior to his death. From the evidence the Court finds that Mr. Heiman would have lived 21 more years and that he would have remained active an an

economic producer for 20 years, calculated from the date of his death.

Since the Court is convinced that decedent would have paid the full costs of his daughters' college educations, it is obvious that during those years when such payments would be required, less would be available for the support of Mrs. Heiman. This situation would reverse, however, when the daughters had completed their educations and were either married or "on their own".

B. **Loss of services.**

Under the *Gaudet* case, *supra*, "services" would include the nurture, training, education, and guidance that Sandra and Judy would have received had Mr. Heiman survived, and would also include those services which he would have performed at home or for his wife. With respect to the former, the Court must find and conclude that both Sandra and Judy actually received nurture, training, education, and guidance from their father over the really important formative years of their lives. They now possess in their personalities the benefits of those important contributions to their lives. That Mr. Heiman would have continued to provide guidance, had he lived, is equally obvious. The point is, however, that the "twig had already been bent" and that Mr. Heiman's future contribution in this respect would have been more on the basis of the mutual interchange one finds among equal adults in a family unit. The Court is assessing some damages for this loss, while recognizing that it was minimal under the circumstances. The Court fixes the lump sum of $1,000.00 as the present value of such loss to Judy Heiman and the sum of $2,000.00 as the present value of such loss to Sandra Heiman, taking into consideration the difference in the ages and status of independence of the two girls at the time of Mr. Heiman's death.

The situation is different with respect to Mrs. Heiman. The evidence indicates that Mr. Heiman provided much in the way of personal services for Mrs. Heiman and for the support of the homeplace itself. He worked around the house, kept the family's books, paid the family's bills, and provided much in the way of direct assistance to his wife. The Court finds that the reasonable value, on an annual basis, of such services would amount to $1,000.00 in 1975 dollars and that such services would have continued for the balance of Mr. Heiman's life.

C. **Loss of Society**

The *Gaudet* case, *supra*, makes it clear that the decedent's dependants are entitled to recover for "loss of society" which, according to the Supreme Court, embraces a broad range of mutual benefits, including "love, affection, care, attention, companionship, comfort, and protection". Although it is difficult to place a value upon such things—most people feeling that it is impossible to measure such benefits in terms of dollars—still lump sum awards will be made to reflect those important losses in this case as follows:

1. For Mrs. Heiman	$35,000.00
2. For Mrs. Lou (Judy) Samuel	$10,000.00
3. For Miss Sandra Heiman	$15,000.00

D. **Funeral Expenses**

Finally, the *Gaudet* case makes it clear that a recovery is permitted for funeral expenses. The Court finds the funeral expense to be $5,096.85.

Damages of Mrs. Alana Heiman and Sandra Jean Heiman

Mrs. Heiman testified that she recalls that the family retired about 10:30 on the evening of September 1. The next thing that she recalls is her awakening in the intensive care unit of St. Vincent Infirmary several days after the accident. From other evidence the Court determines that Mrs. Heiman first regained significant consciousness on September 5. She was not really clear of mind until September 6. As she regained consciousness, she found that it was difficult to breathe (a tracheostomy having been performed while she was still in a comatose state) and noticed that her hands were bound to the side of the bed. She was confused and became instinctively terrified. She was receiving fluids intravenously and had to be suctioned when she began to cough. As she regained awareness of the situation, she found that she was on a respirator. Her leg, in which she had phlebitis and in which she had received a transfusion, caused her pain. She recalls developing pneumonia, with attendant fatigue, coughing and pain in her chest.

She is aware that she developed cerebral edema and heart difficulties which occasioned numerous cardiograms.

Mrs. Heiman has made a remarkable recovery, considering her close brush with death. She has continuing difficulty with her leg, which swells when she is on it for any length of time. When the leg swells, it causes pain. She has experienced no continued difficulty as a result of the tracheostomy except an occasional feeling of "drawing" or tension in her throat. Psychologically she has not made as complete a recovery. She still is extremely nervous and, on occasion, becomes emotionally upset. She finds that she cries quite frequently, but is trying to fight off these emotional residuals. She is, according to her own testimony and the testimony of her doctor, coping quite well with these difficulties.

When Sandra Heiman first regained consciousness several days after the accident in the intensive care unit of the hospital, she, too, was very frightened. There were needles in her arms and she had trouble breathing and talking. Her knees were swelling and causing considerable pain. As indicated in the discussion of Dr. Levy's testimony below, Sandra has made a remarkable recovery, but she does have some residuals. She finds that she tires much more quickly now than before the accident, feeling that she has somewhat limited breathing capacity. Her voice is lower and cracks on occasion as a result of the tracheostomy and treatment while in the hospital. She still has a numb place on her leg.

Emotionally, Sandra finds that she still cries more often than before, but it is evident to the Court, as it was to Dr. Levy, that she is getting control of this situation.

It would be well at this time to discuss briefly the relationship between Sandra and her father. Theirs was a particularly close relationship. Sandra was a real "tomboy" and enjoyed fishing, shooting skeet, and watching football games with her father. She helped Mr. Heiman do such things as reloading his shells and he, in turn, taught her how to drive an automobile. In sum, there was a close, warm, affectionate relationship between Sandra Heiman and her father that was obvious not only to Sandra and her father but also noted by the rest of the family and the family's friends.

Dr. Jerome Levy was the physician in charge of the handling of Mrs. Heiman's case and Sandra Heiman's case. The Court was most favorably impressed by the testimony of Dr. Levy. That testimony reflected that nice balance of personal concern for his patients and complete professional objectivity. He was not cross-examined by any of the attorneys for the defendants.

Dr. Levy is principally an internist. He first saw Mrs. Heiman around 4:00 p.m. on September 2. (She had been earlier at-

tended by Dr. John Samuel in the emergency room. Dr. Samuel is now deceased.) He found Mrs. Heiman unconscious and in a form of shock. She showed evidence of brain injury and her pulse was rapid, although her blood pressure was normal. When admitted, Mrs. Heiman's lungs were clear and her breathing was satisfactory. He assessed her overall condition as critical due to carbon monoxide poisoning and sought consultation with Dr. John Schultz, who was well-trained in respiratory problems, and Dr. Howell, a neurologist. Dr. Schultz was called in because Mrs. Heinman soon developed difficulty in breathing. Dr. Howell was called in because of the fear of possible brain damage or injury. As the breathing difficulty developed, it became obvious that a tracheostomy would have to be performed, and Dr. Stewart, a chest surgeon, was called in for this purpose.

The breathing problem which developed is a form of respiratory failure. The collection of fluid in the tissue blocks the oxygen distribution. Oxygen was administered and the tracheostomy permitted a satisfactory air exchange. Nevertheless, Mrs. Heiman developed pneumonia. The carbon monoxide soon produced cerebral edema in Mrs. Heiman. Although the precise mechanics of causation are not known, the lack of oxygen available to the tissue causes fluids to develop in the cells and between the cells with consequent swelling. This is treated by the tracheostomy and provision for pure oxygen heretofore mentioned, and also by the use of dexamethasone, a steroid which mobilizes the fluid permitting it to get into the bloodstream and thus to be carried away.

About the time the doctors began to make progress with the cerebral edema, they noted difficulties with Mrs. Heiman's heart. Some areas of the body are particularly susceptible to damage due to loss of oxygen. The brain, lungs, heart and kidneys are the critical organs. Heart tissue and cells become weak and do not function properly because of lack of oxygen. Dr. Levy testified that Mrs. Heiman did sustain injury to her heart re-

flecting myocardial damage. This condition was treated by rest, oxygen and the use of a drug which regulated Mrs. Heiman's blood pressure. The heart condition steadily improved, but it was several months before Dr. Levy found the heart muscle restored to its normal strength and condition.

Mrs. Heiman was in the hospital from September 2 to September 15, most of the time in intensive care.

The first day that Mrs. Heiman's mind was clear was September 6. On that occasion she asked about Mr. Heiman, and Dr. Levy told her the truth.

Dr. Levy has followed Mrs. Heiman since her discharge from the hospital and has found that she has progressed very well under the restrictions imposed by him. After approximately six months, her physical condition stabilized, leaving her with only minor physical residuals. She still has trouble with the blockage of the vein in her leg resulting from the aggravation of her phlebitis condition, but Dr. Levy is convinced, overall, that she has done extremely well. Dr. Levy indicates that it will take longer for Mrs. Heiman to attain complete relief from the emotional and psychological results of her injuries, but he is convinced that she is making a determined effort in this connection.

Although Mrs. Heiman has made a remarkable recovery, it is equally clear to the Court that she suffered great mental and physical pain as a direct result of her exposure to the carbon monoxide.

Dr. Levy also handled Sandra Heiman's case. Sandra was 17 at the time of the accident and was just preparing to enter her senior year in high school. Miss Heiman's symptoms and difficulties paralleled those of her mother, but in some areas were worse, according to Dr. Levy. She developed an almost fatal complication relating to her renal system. At the very time when she was recovering from the same cerebral edema and heart con-

ditions as those suffered by her mother, she had a kidney failure which approached a uremic state. However, she was treated for this condition and fortunately snapped back, and thereafter proceeded steadily on the road to recovery. Sandra also suffered from acute respiratory failure which also required a tracheostomy. A respirator was used to assist her to breathe, just as in the case of her mother. She also was discharged from the hospital on September 15.

Dr. Levy states that the brain, heart, lung and kidney conditions suffered by Sandra Heiman have been restored and repaired by nature's efforts since then. Sandra, too, noted her own remarkable recovery as far as her physical condition is concerned. The main residual, according to Dr. Levy, is that resulting from emotional shock. Even in this area, it appears that she has made good progress although, as expected, she experiences some relapses on occasion. It is clear from the evidence that Sandra has suffered no permanent brain damage. She is making an excellent scholastic record in college.

The Court finds the reasonable value of the medical and hospital services rendered to Mrs. Heiman to be $5,893.50 and the reasonable value of such services for Sandra Heiman to be $5,037.88.

For all other appropriate elements of damage for their personal injuries, the Court finds that Mrs. Heiman is entitled to the sum of $15,000.00 and Miss Sandra Heiman is entitled to the sum of $12,500.00.

Besides Sandra Heiman, the Heimans had only one other child, Judy, who is now Mrs. Lou Samuel. Judy was at the University of Arkansas at Fayetteville when she learned of the tragedy. She immediately came home and did not thereafter return to the University at Fayetteville.

Judy, too, had a very special and close relationship with her father. When Judy was at Sophie Newcomb College in New Orleans, her father talked to her by long distance telephone from his office at least once a week. Whenever he went to Florida to check on his business investments, he would detour through New Orleans so he could visit Judy. In addition, Mr. and Mrs. Heiman both made frequent trips to New Orleans to visit their daughter.

Judy was engaged to be married at the time of the accident. Mr. Heiman made several trips with her about the country so that she might find a wedding dress that they both liked. Such episodes simply illustrate the basic relationship.

To further detail that evidence which so clearly shows the strong mutual happy feelings of love, concern, understanding and warm affection which characterized this strong family unit would serve no useful purpose. What has been said should suffice.

Damages—Inflation Factor

The Court is convinced that the law permits, and realism requires, the assessment of any reasonable probable inflationary or deflationary trend over the future years in which it is found that contributions would have been made or services would have been rendered by a decedent. Where a proper evidentiary basis is laid, the Court should consider such trends and their effect upon the purchasing and earning power of the dollar. The Court was impressed with the testimony of Dr. Floyd Durham, a professor of economics at Texas Christian University. While not agreeing with certain of his findings and conclusions concerning future trends, the Court was impressed with his overall analysis thereof and has used that analysis, along with other evidence in the case, in reaching its own conclusion as to an appropriate adjustment in this case for inflationary trends.

The law requires the trier of fact to determine the *present* valuation of contributions which would have, had the decedent lived, been made over a period of future years. To get the present value, the trier of fact must determine an appropriate discount rate. On the other side of the coin, the trier of the facts should attempt to evaluate future inflationary trends in order to properly reflect the purchasing and earning power of the dollar over those same future years. Dr. Durham used a discount rate of 4½ percent and an inflationary rate of 5½ percent. The Court, on the other hand, finds that the more appropriate discount rate would be 5½ percent and the more appropriate inflation rate would be 4 percent considering the two decade projections we are working with here.

Indemnity

Medlin Marine, Inc. is entitled under the law to an indemnity judgment over against the defendant Boatel for all amounts for which judgment against Medlin has been awarded herein in favor of the plaintiffs.

Contribution Among Tortfeasors

The Court fixes and assesses the relative degree of fault between the defendant Boatel Company and the defendant Marine Development Corporation as follows:

Boatel Company	80%
Marine Development Corporation	20%

This Memorandum Opinion, together with the findings of fact and conclusions of law heretofore stated in open court, shall constitute the decision and the opinion of the Court in this proceeding.

Plaintiffs' counsel will prepare a judgment in accordance herewith and submit it to opposing counsel for their approval as to form, and then to the Court.

Dated this 7th day of March, 1975.

GARNETT THOMAS EISELE
United States District Judge

APPENDIX E

Finding of Fact Issued by the Trial Judge From the Bench at the Conclusion of the Evidence

I am not today making any findings with respect to damages; although, as you will note presently, those issues are very much before the Court and I did spend some time on those issues today, perhaps at the cost of the business at hand.

I am making these findings but I may well file additional findings, even with respect to the issues covered here. I may supplement these findings in a memorandum since a memorandum will have to be filed covering other issues anyway.

I want to start by stating certain conclusions of law, particularly with respect to matters that I do not believe are subject to any real controversy and where the underlying facts are quite clear.

Boatel is liable to the plaintiffs on the bases of strict liability, implied warranty, and negligent design.

Medlin Marine, Incorporated is liable to the plaintiffs on the bases of strict liability and implied warranty.

There is no negligence or carelessness on the part of the decedent, Mr. Max Heiman, or on the part of Alana G. Heiman or Sandra Jean Heiman which caused or contributed to the death of Mr. Heiman or to the injuries and damages sustained by Alana Heiman and Sandra Jean Heiman.

The Court further concludes that the liability of the defendant Medlin Marine, Incorporated is based upon the legal relationships existing between it and the manufacturer, on the one hand, and between it and Mr. Max Heiman on the other.

There is no separate and independent basis for liability of Medlin Marine to the plaintiffs based upon the acts or omissions of Medlin or any of its agents or employees. In this connection the Court finds that none of the representatives of Medlin—any of its agents or employees—knew or should have known of the four holes on the underside of the transom of the Heiman boat prior to the accident.

Now this is probably not really in dispute, but I want to make this finding. There is no evidence to indicate that either Mr. Heiman or anyone else ever spent a night on the yacht prior to the night of September 1, 1973. There is no evidence to indicate or to suggest that the generator, airconditioning system on the yacht was ever, prior to September 1, 1973, operated for any substantial period while the vessel was moored, beached, or anchored.

In fact, the evidence is to the contrary, indicating this was the first and only night the Heimans ever spent on the yacht and the first and only occasion during which the generator, airconditioning systems were operated together for an extended period of time while the boat was stationary.

The night in question was, according to Mr. Eherenberg—and the Court so finds—was ideal. The water was calm. There was a slight breeze from the east, which would mean that it approached the Heiman boat from the stern.

Now I am going to make what might be called "miscellaneous findings of fact", because they are not really tied together in any narrative form, in response to the requests and suggestions of the parties. Of course, it's going to be necessary that these findings be integrated in with and related to the other findings that I am going to make today and perhaps later.

Considering the arrangement of the boat and its equipment as it existed on September 1, 1973, a substantial risk existed that discharged engine exhaust gases would be drawn back

into the engine compartment through the four water drain hole when the generator engine alone was operating.

This process would be accelerated when the forward air-conditioning system was activated. This would be so, even with the sliding door entirely open; but the tendency would be increased as the sliding door was progressively closed.

There are direct air passages, significant in size, between the engine compartment and the other areas of the yacht as a result of openings in the forward wall of the engine compartment. The largest of these openings is next to the upper starboard wall of the engine compartment. There is a smaller opening at a similar location on the port side. In addition, there is a tiny crack around the thermostat which is used to control the heater in the engine compartment.

On the night in question carbon monoxide from the generator engine was exhausted into the water immediately under the overhang portion of the transom. The carbon monoxide, which is slightly lighter than air and which was also warmer than the ambient air, was propelled out of the water directly under the transom where it was drawn through the four holes in the transom into the engine compartment by the negative pressure being created in the engine compartment by the operation of the generator and the air-conditioning system.

High concentrations of carbon monoxide developed in the engine compartment and were drawn forward, principally through the right starboard opening in the engine compartment, into the equipment room where the carbon monoxide entered the forward cooling unit from which it was discharged into the forward living areas and then circulated by both air-conditioning units throughout the yacht.

The buildup of the carbon monoxide in the living quarters resulted in the death of Mr. Max Heiman and the injuries to Mrs. Heiman and Sandra Heiman.

A completely airtight bulkhead between the rear cabin and the engine compartment of the Heiman yacht would have eliminated the hazard of introducing carbon monoxide from the generator engine into the living quarters of that vessel.

The introduction of an appropriately designed arrangement which would induce fresh air into the air-conditioning system at the proper point could have virtually eliminated the hazard of introducing lethal quantities of carbon monoxide into the living quarters of the vessel.

This simply means that positive pressure can be designed into an air-conditioning system which will have the effect of causing an outflow rather than an inflow of air from the engine compartment. Such a system would probably require larger air-conditioning tonnage and consequently cost more to obtain the same cooling and heating effect as a recirculating system.

It should be noted, however, that elsewhere in my findings I have found that there is nothing inherently or per se hazardous in the use of a properly installed recirculating system on a boat such as Mr. Heiman's.

Leaks do occasionally develop in the exhaust systems of marine generator engines and in the exhaust systems of marine propulsion engines, resulting in the direct discharge of carbon monoxide into the engine compartment, and this fact was known by or should have been known by the defendants and third-party defendant, Kohler.

The four holes in the transom of the Heiman yacht constitute a defect which was a proximate cause of the death of Max Heiman and the injuries to Mrs. Heiman and Sandra Heiman, and thus creates liability against Boatel and Medlin Marine on the basis of strict liability.

The location of the intake for the forward air-conditioner in the equipment room of the yacht, combined with the mak-

ing of the openings in the engine room forward bulkhead and the location of such openings, together constitute a defect which was a proximate cause of the death of Max Heiman and the injures to Mrs. Heiman and Sandra Heiman, thus creating liability against Boatel and Medlin Marine on the basis of strict liability and tort.

The defendant, Marine Development Corporation, did not design the air-conditioning as it is found and arranged in the Heiman boat. That design and arrangement was made and carried out by Boatel alone and was in direct violation of the clear and unambiguous installation instruction furnished by Marine Development.

The Court finds and concludes that there is nothing inherently or per se defective or hazardous in the use of properly installed recirculating air-conditioning systems.

Further, although there was evidence to the contrary, the Court finds that had the air-conditioning components provided by Marine Development been properly installed by Boatel in accordance with Marine's manual the Heimans would not have been harmed.

This finding must be limited to the facts of this case since the evidence suggests that under altered configurations such a system, even if installed according to the manual, might cause or contribute to such an accident.

Therefore, the difficult question concerning Marine's liability does not turn on any defects in its components—there were none —or upon its participation in the as-is design of the Heiman air-conditioning system; but rather upon its duty to warn Boatel of the potential consequences of improperly installing its components, given its knowledge or imputed knowledge of the boat designs and given its overall business relationship with Boatel.

It is clear from the evidence that none of the parties to this action ever realized, prior to their investigations of this accident, the serious hazard which results from the improper location of the cooling units when combined with the circumstances that the bulkhead between the engine compartment and the living spaces of the boat is not airtight or even substantially airtight.

Still, the evidence is such that all of the defendants and the cross-defendant, Kohler Company, knew or should have known there was a risk—however slight—that carbon monoxide would, at sometime during the life of the vessel, be in the engine compartment.

The principal basis for this statement is not that any of the parties except Boatel knew or should have known that Boatel would design a drain system as it did, thereby providing direct access of carbon monoxide from outside the boat back into the engine compartment; but rather that such parties knew or should have known that carbon monoxide might, during the life of the vessel, escape from either the generator motor or from one of the two propulsion engines due to accident or ordinary wear and tear during the life of the vessel.

The Court finds and concludes that Marine Development Corporation knew or should have known that there were significant openings from the engine compartment into the living spaces—and I believe that statement was acknowledged in the opening statement of Mr. Carroll—and that they knew or should have known that carbon monoxide might, during the life of the vessel, be found in the engine compartment in dangerous concentrations.

Marine Development also knew or should have known that if the forward cooling unit were installed as it was in the equipment room it could and would, under certain foreseeable circumstances, draw air from the engine compartment and circulate it throughout the living areas of the boat.

Of all the parties to this action, Marine is and should be the most knowledgeable with respect to the effects of air-conditioning systems and their operations. It has more than 50 percent of all of the air-conditioning business in the class of boats and yachts of the approximate size of the Heiman vessel.

It has held itself out as a specialist in marine air-conditioning and has represented to its customers and to the public at large that it has a long history of testing and improving its products. It has maintained a close relationship with a large number of boat manufacturers. It has a naval architect on its staff and others experienced in boat construction.

It knew that with very rare exceptions all craft for which it supplies air-conditioning equipment have non-airtight engine compartments. It knew that the engine which drives the generator is almost invariably located in the engine compartment along with the propulsion engines. It knew that its products would be integrated with the Kohler unit or an Onan unit and operated in conjunction with such a unit.

It is further clear from the evidence that Marine Development Corporation sells more than off-the-shelf products to its customers be the manufacturers of boats or its franchise dealers.

Marine, in fact, offers advice and assistance with respect to the design and installation of the components which it manufactures. Here Boatel, if it actually received such advice, did not follow it; but the question remains: Should a party in the position of Marine, with its superior knowledge and information, not only advise its customers how properly to install its products but also where there is a significant, known hazard to health or life which could result from improper installation, clearly and specifically to warn thereof.

The Court has already found that Marine did not really understand and appreciate the effect of the improper location of its units in terms of the hazard to life and health involved, al-

though it did understand the effects of such improper location upon the efficient operation of its cooling and heating equipment.

The Court finds and concludes that defendant, Marine Development Corporation, should have known of the hazard to life and health posed by the improper installation of its equipment; and, therefore, that it should have warned Boatel in a clear and unequivocal way concerning same.

A manufacturer must know the nature and propensities of its products and warn of dangers created by that nature and those propensities. In this connection a distinction must be drawn between the duty to give adequate instructions and directions for the use or installation of a product, on the one hand, and the duty to warn of potential hazards which might result from deviations from such directions or instructions, on the other hand.

Here Marine did not know the hazards and, therefore, did not warn against them. Its instructions requiring that the cooling unit be located in the space to be cooled or heated and that such units should be installed so that there would be an adequate path for the air to circulate freely into the units from the space being cooled and then from the units back to the space being cooled were obviously and clearly directed toward the objective of the efficient utilization of the equipment for heating and cooling.

In the eyes of Marine Development Corporation the improper installation of a cooling unit in a space other than that to be cooled would greatly interfere with the efficient operation of the equipment. That it might also act as a pump to draw any carbon monoxide which might be in the engine compartment was not known or considered by Marine prior to the investigation of this tragedy.

Directions and warnings obviously serve different purposes. Rarely can one be an adequate substitute for the other. It was Marine's duty here, therefore, to warn of any hazard to life or health that might foreseeably result from the improper location of its equipment.

The failure to warn may be predicated upon the theories of either negligence or strict liability. Here Marine, being so intimately associated with boat manufacturers and boat designers, knew or should have known that such manufacturers, for their own convenience and for design purposes, might install the cooling unit so as to have the effect of pumping air from the engine compartment.

The potential seriousness of the injury which might result is obvious. In addition, there is no practical impediment to its ability to give an adequate warning. Carbon monoxide is odorless, colorless, and tasteless. It is insidious and subtle in its operation and effect. If there is any risk of it being introduced into a living space, a warning of that risk should obviously be given.

The Court finds and concludes that Marine Development Corporation owed such a duty to warn not only Boatel, the boat manufacturer, but also prospective purchasers and users of the craft under the facts and circumstances of this case.

Marine Development did not undertake to actually inspect and supervise the installation of its equipment by boat manufacturers, although it frequently made itself available to perform such services when a new model or a new installation was contemplated.

Where it knows that it will not be in a position to supervise and inspect the installations on each of the boats in which its equipment is installed, then it obviously has the duty to prospective purchasers and users to adequately warn them of the

potential hazard which would result from the improper installation of that equipment.

The Court finds and concludes that Marine Development's failure to give such a warning was a proximate cause of the death of Mr. Heiman and the injuries of Mrs. Heiman and Sandra Heiman.

Now I am going to make certain findings with respect to Kohler, but I can tell you before I conclude that I have yet to determine legal liability with respect to that particular question. I hope to do so promptly.

In any event, the factual findings that I will make are as follows:

The Kohler Company supplied Boatel with a generator set consisting of the generator proper, an internal combustion engine to drive the generator, and a muffler which Boatel then installed in the engine compartment of the Heiman boat. These Kohler products were line production items which were sold by Kohler to Kizer Engine Sales in Green Bay, Wisconsin, which in turn sold them unchanged to Boatel.

The first Islander 47 yacht was constructed in September 1969 and either contained an Onan or Kohler generator unit. The recirculating air-conditioning systems were not installed on Boatel yachts as optional equipment until sometime in 1971. No tests were made by Boatel, the manufacturer, to determine how these items of optional equipment affected each other in the completed boat. The photos of the yacht contained in the Boatel brochure, Plaintiff's Exhibit 34, and other evidence indicates that not all Islander 47 yachts have the bilge blower exhaust vent located on the vertical transom panel.

Although there was some evidence indicating that Kohler representatives saw the Islander 47 yacht displayed at the boat

show in 1969, there is no adequate evidentiary basis for the Court to find that the displayed boat had the bilge blower exhaust vent located in its transom as it is on the Heiman boat.

The Court further finds that at no time prior to the commencement of this action did Kohler or any of its representatives know or have any reason to know of the four drain holes located in the underside of the overhanging portion of the transom.

Now by way of footnote, Kohler cites as a defense the language which is contained in its manual which provides: "Never put inlets on the transom." The Court does not feel this language gives Kohler much comfort because it finds that the term "inlets" properly interpreted, in context, would be restricted to the venting systems of inlets and outlets there under consideration in that portion of the manual.

In installing the generator, Boatel relied upon the Kohler technical installation manual. Although Kohler's manual indicates on the first page that detailed installation plans can be obtained upon request from Kohler, none were ever requested by Boatel. Boatel alone designed the transom of the boat, the engine compartment, the forward wall of the engine compartment, the installation arrangement for the air-conditioning system, and the sliding door arrangement for the forward air intake.

It is undisputed that no consequential leaks existed in the Kohler unit or its exhaust system. There is no evidence that the Kohler components were defective in design, installation or operation. There is a complete absence of any evidence of any manufacturing defect which was in existence at the time the components left the Kohler factory. It is undisputed that fumes and gases from the Kohler gasoline combustion engine were exhausted outside of the boat.

Mr. Klapmeier of Boatel admitted that he was well aware of the fact that internal combustion engines emit carbon mo-

noxide, that carbon monoxide is dangerous and lethal, and that he knew these facts before designing the Islander 47 yacht.

Now, gentlemen, that is as far as I have gotten. I have not made my final decision on the possible Kohler liability and I have not made findings here yet with respect to damages. I hope to complete this maybe even tomorrow—hopefully tomorrow—because I need to get on with the business of the Court. If so, we will call you and let you know so that you can come by and pick up copies of the further findings and conclusions.

If there is nothing else, we will be in recess.

(Whereupon, at 5:35 p.m., the above-entitled proceedings were concluded.)

Supreme Court, U. S.
FILED
SEP 2 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-161

MEDLIN MARINE, INCORPORATED,
Petitioner,

vs.

MRS. ALANA G. HEIMAN, in Her Own Right; SANDRA JEAN HEIMAN, by MRS. ALANA G. HEIMAN, Her Mother and Next Friend; and H. MAURICE MITCHELL and JOSEPH W. GELZINE, Co-Administrators in Succession With Will Annexed of the Estate of Max Heiman, Deceased, and MARINE DEVELOPMENT CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF MARINE DEVELOPMENT CORPORATION IN OPPOSITION

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OPINIONS BELOW

The per curiam order of the Court of Appeals is unreported and appears in petitioner's Petition for Writ of Certiorari in the Appendix, pages A-1-2. The original unreported opinion of the Court of Appeals appears in petitioner's Petition for Writ of Certiorari in the Appendix, pages A-3-22. The unreported

supplemental memorandum opinion of the District Court appears in petitioner's Petition for Writ of Certiorari in the Appendix, pages A-23-25. The unreported memorandum opinion of the District Court appears in Petitioner's Petition for Writ of Certiorari in the Appendix, pages A-26-48. The unreported Findings of Fact of the District Court appear in the petitioner's Petition for Writ of Certiorari in the Appendix, pages A-49-60.

JURISDICTION

The Judgment by way of per curiam order of the Court of Appeals was entered on May 14, 1976. A timely Petition for Rehearing was denied on May 7, 1976 and petitioner's Petition for Writ of Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, under Federal Maritime Law, the Court of Appeals for the Eighth Circuit properly held that Medlin Marine, Inc., was not entitled to indemnity from Marine Development Corporation.

2. Whether the trial court erred in projecting a specific rate of inflation over Max Heiman's life expectancy in measuring damages for loss of future earnings.

STATEMENT OF THE CASE

This is an admiralty case originally brought in Federal District Court for the Eastern District of Arkansas under the provisions of Federal Rules of Civil Procedure 9(h). Max Heiman died aboard a pleasure yacht from carbon monoxide asphyxiation

on the night of September 1, 1973. His wife, Alana, and daughter, Sandra, were injured. An action was commenced by the estate of Max Heiman and by his wife and daughter against Boatel, the manufacturer of the boat; Kohler, the manufacturer of a gasoline powered generator on the boat; Marine Development Corporation (hereinafter sometimes referred to as respondent Marine) the manufacturer of air conditioning component parts, which were sold to Boatel to be used in the air conditioning system on the Heiman yacht; and the petitioner, Medlin Marine, Inc., the retailer of the boat.

Recovery was sought against defendants on the bases of negligence, breach of implied warranties and strict liability. Being in Admiralty, the case was tried before the Honorable Judge G. Thomas Eisele. At the close of the evidence, the Court made separate Findings of Fact and Conclusions of Law. The manufacturer, Boatel, being in default, was found liable on the bases of breach of implied warranty, negligence and strict liability. (Pet.App.A.-49). The seller, Medlin, was found liable on the bases of strict liability and breach of implied warranty. (Pet.App.A-49). The Court found that the generator manufacturer, Kohler had no duty to warn and therefore was not liable. (Pet.App.A-33). The air conditioning component part manufacturer, Marine Development Corporation, was found liable for negligent failure to warn. (Pet.App.A-57). The trial court apportioned fault between Boatel and Marine, finding 80% attributable to Boatel and 20% to Marine. (Pet.App.A-47). The Court, by supplemental opinion, found that the fault of Medlin was equal to the negligence of Marine, and that neither was entitled to indemnity from the other. (Pet.App.A-24-25).

In assessing the damages against Medlin and Marine for the decedent's loss of future earnings, the Trial Court used an inflation factor based on the testimony of an economist to adjust the award upwards and thereby minimize the effect of reducing it to present value.

Petitioner appealed the lower court's decision to the Eighth Circuit Court of Appeals on two questions: its right to indemnity from Marine Development and the propriety of the trial court's use of an inflation factor in computing damages. The Eighth Circuit originally found that Medlin was entitled to indemnity from Marine Development and that the lower court erred in allowing the economist to testify concerning future inflationary trends. The Court of Appeals, finding that the introduction of the economist's testimony did not constitute reversible error, allowed the trial court's assessment of damages to stand.

Upon a rehearing en banc, the Eighth Circuit withdrew its earlier Opinion and reinstated the lower court's judgment.

ARGUMENT

The Decision Below Properly Denied Indemnity, Based on the Trial Court's Finding That the Fault of Medlin Was Equal to the Negligence of Marine.

The case was tried to the court without a jury over an eleven-day period. The trial court, at the close of all the evidence, made specific Findings of Fact and Conclusions of Law orally from the bench on March 4, 1975 (Pet.App.A-49-60). On March 7, 1975, by way of memorandum opinion, the court made additional findings as to damages and liabiiity. (Pet.App.A-26-48). The specific ruling that petitioner was not entitled to indemnity from respondent Marine was subsequently decided by the trial court in a separate opinion after both petitioner and Marine had submitted briefs on the issue and the trial court had carefully reviewed the evidence and findings. (Pet.App.A-23-25).

Respondent Marine contends that the Court of Appeals erred in holding it liable for failure to warn and has filed a Separate Petition for Writ of Certiorari (October Term, 1976; No. 76-160) on that issue. Marine respectfully submits that if it is liable, then the trial court's findings that petitioner and respondent Marine were equally at fault is not "clearly erroneous" under Rule 52 of the Federal Rules of Civil Procedure.

Petitioner contends that the effect of the action of the Eighth Circuit was to hold that under Federal Maritime Law, a non-negligent party is not entitled to indemnity from a party whose negligence actually caused the wrong complained of. This statement is misleading in that it completely ignores the court's finding that both Medlin and Marine were equally at fault. Petitioner relies heavily on the trial court's finding that it was not negligent and that its liability was based solely on its position in the chain of distribution. This was only one of many findings made by the trial court. In fact, as to the finding relied on by

petitioner, the trial court issued a caveat that it might file additional findings even with respect to the issues covered. (Pet.App. A-49). The trial court did in fact make additional findings, and on the issue of indemnity as between petitioner and respondent Marine, it stated:

> "It is true that the court has heretofore apportioned the fault predicated upon negligence as between the two defendants held to be negligent, i.e., Boatel and Marine Dvelopment, but it has not made any determination of the comparative fault between the defendant Medlin and the defendant Marine, or any other defendant. . . . [T]he error of Medlin is in assuming because of the Court's finding that Medlin's liability was one based simply upon Medlin's legal position as the retailer of the boat, that Medlin is 'without fault.' The truth is that the law of strict liability implies fault. Medlin chose to deal with Boatel and to place the latter's product in the hands of the public. . . .
>
> "After analyzing the precedents cited by both Medlin and Marine the Court is convinced that we are dealing with a problem of contribution among tortfeasors rather than the question of tort indemnity. The problem, however, is that we are called upon to compare the fault of one held liable on a theory of strict liability with the fault of another held liable on a theory of negligent failure to warn.
>
> ". . . It is open to the Court to determine where the law should rest as between the two other defendants, whose fault is so much less, relatively, than Boatel, then the Court would find it most difficult to find greater fault on the part of one than on the other, viewing 'fault' in the light of the facts and the policies and attitudes reflected in the law concerning negligence and strict liability." (Pet.App.A-24-25).

Strict liability implies fault, and policywise, the tort of strict liability is a more serious tort than the tort of ordinary negli-

gence. *Kossifos v. Louden Machinery Co.*, 317 N.E.2d 740 (Ill.App.1974).

The trial court specifically stated that its apportionment of fault between Boatel and Marine was not in any way determinative of the relative fault between Medlin and Marine. Rather, the court held that Medlin was in fact guilty of fault in dealing with Boatel and in placing Boatel's product in the hands of the public. In apportioning fault between Boatel and Marine, the trial court found Boatel 80% at fault and Marine 20% at fault. (Pet.App. A-47). How can Marine which is only 20% at fault be "solely" at fault? How can Medlin which is "equally" at fault be said to be innocent? The trial court specifically stated in its findings that the apportionment of fault predicated upon negligence, between Boatel and Marine, was only between those two defendants, and was not a determination of comparative fault between petitioner and respondent Marine, nor any other defendant. (Pet.App. A-24). The "culprit", the principal (i.e., "primary" or "sole") wrongdoer was Boatel, not Marine, as the trial court held. Based on the cases cited by petitioner, the trial court correctly allowed indemnity to petitioner from Boatel, and correctly denied indemnity from Marine. (Pet.App. A-24).

The problem is one of contribution among tortfeasors rather than indemnity, as the trial court held. (Pet.App. A-24). Admiralty law allows contribution among joint tortfeasors in a non-collision admiralty case. *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974). The trial court's finding that Marine and Medlin were joint tortfeasors is not "clearly erroneous," but, to the contrary, is well supported by the facts and law. For these reasons, respondent Marine, respectfully submits that the Petition for Writ of Certiorari filed by petitioner should not be granted on this point since Rule 19 requires "special and important reasons therefor" and no such reasons are present in this case.

The Circuit Courts Are Not in Agreement on the Question of Whether Federal Admiralty Courts May Consider Future Inflationary Trends in Awarding Damages for Future Earnings.

Respondent Marine joins petitioner in praying that a Writ of Certiorari be issued, but solely for the purpose of reviewing the Judgment and Opinion of the Eighth Circuit on the issue of whether the courts may consider future inflationary trends in awarding damages for future earnings in an admiralty case.

In *Petition of United States Steel Corp.*, 436 F.2d 1256 (6th Cir. 1970), the court stated at page 1279:

> "The second issue concerns the Commissioners' failure to discount to present value the awards for future damages in all of the cases. The Commissioners' refusal to include in their computation of damages a reduction of future damages to present value was based upon their assumption that inflationary trends resulting in a loss in the purchasing power of the dollar by 4% per annum would offset any reduction to present worth at 4% simple interest. This was error. It is well settled that an award for future damages must be reduced to present value in order to take into account the earning power of that money. *Chesapeake & Ohio Ry v. Kelly*, 241 U.S. 485, 491, 36 S.Ct.630, 60 L. Ed. 1117 (1916). It is equally well settled in this Circuit that the prospect of future decline in the purchasing power of the dollar may not be used to offset the reduction to present value. *Sleeman v. Chesapeake & Ohio Ry.*, 414 F.2d 305 (6th Cir. 1969)."

Riha v. Jasper Blackburn Corp., 516 F.2d 840 (8th Cir. 1975), was decided by the Eighth Circuit prior to *Johnson v. Serra*, 521 F.2d 1289 (8th Cir. 1975), one of the cases relied upon by petitioner. Though not an admiralty case, the *Riha* opinion points out that not only the federal courts, but also the

state courts are divided on the issue of whether testimony of inflationary trends should be considered in assessing damages. (516 F.2d at 844). In *Johnson* the Eighth Circuit noted that in federally created claims, the majority of the federal courts have rejected consideration of future inflationary trends. (521 F.2d at 1295-6). In affirming the lower court's decision on this point, the Eighth Circuit took a position contrary to several other circuits and to its own prior decisions.

In summary, the use of future inflationary trends, whether based upon expert testimony or simply on the personal experience of the trier of facts, is merely an artifice employed to circumvent the well recognized principle that tort damages must be reduced to present value. As Judge Ross succinctly stated in his dissenting opinion:

> "I also dissent from the affirmance of the award of over half a million dollars in damages. It is inconceivable to me how—when 'economists have fared only slightly better than fortune tellers and soothsayers' and the prediction of inflationary or deflationary trends by an expert is 'to a considerable extent speculative and conjectural'—we can allow a federal judge to do what the acknowledged experts in the field cannot; that is to project a specific annual inflation rate over a person's life expectancy." (Pet.App.A-21)

CONCLUSION

1. The Petition for a Writ of Certiorari on the question of indemnity should be denied.

2. The Petition for a Writ of Certiorari on the question of whether in an admiralty case the federal courts may consider future inflationary trends in awarding damages for future earnings should be granted.

Respectfully submitted,

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